

OPENING STATEMENTS

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1 STATE OF MINNESOTA DISTRICT COURT
 2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
 3 - - - - -
 4 The State of Minnesota,
 5 by Hubert H. Humphrey, III,
 6 its attorney general,
 7 and
 8 Blue Cross and Blue Shield
 9 of Minnesota,
 10 Plaintiffs,
 11 vs. File No. C1-94-8565
 12 Philip Morris Incorporated, R.J.
 13 Reynolds Tobacco Company, Brown
 14 & Williamson Tobacco Corporation,
 15 B.A.T. Industries P.L.C., Lorillard
 16 Tobacco Company, The American
 17 Tobacco Company, Liggett Group, Inc.,
 18 The Council for Tobacco Research-U.S.A.,
 19 Inc., and The Tobacco Institute, Inc.,
 20 Defendants.
 21 - - - - -

22 TRANSCRIPT OF PROCEEDINGS
 23 VOLUME 6, PAGES 1034 - 1168
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 25

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1 P R O C E E D I N G S
 2 (In-chambers proceedings.)
 3 THE COURT: We have a letter from the
 4 plaintiffs regarding some of the statements made in
 5 the opening yesterday, and one statement that was
 6 made that raises concern to the court was the
 7 statement that this case is only about money. Now we
 8 can do one of two things. You can correct that in
 9 your opening statement, or I can correct it. I'd
 10 prefer that the defendants correct it.
 11 Secondly, a question was raised with regard to
 12 indirect reference to death benefits. I just want to
 13 caution you. I've given you two oral cautions and
 14 one written caution, and if you force me I will
 15 direct that question to the jury. That can be a very
 16 emotional question and I'd much prefer not to and
 17 I've been taking great steps to avoid that. So when
 18 you proceed, proceed with great caution so that you
 19 don't force me to do that.
 20 MR. BLEAKLEY: Has Your Honor seen our
 21 response to Mr. Ciresi's letter?
 22 THE COURT: Yes, I have. I'm just giving
 23 you a caution. Don't box me in. Okay?
 24 MR. BLEAKLEY: I just want to make clear on
 25 the record two things. One, I did not say this case

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1 is only about money. What I said is the case before
 2 you, ladies and gentlemen of the jury, is about
 3 money, and that was a true statement.

4 THE COURT: That is not acceptable. Now I
5 want it corrected or I'll correct it.
6 MR. BLEAKLEY: And what do you suggest I
7 say?
8 THE COURT: I'm not going to tell you what
9 to say. I don't want the jury given the impression
10 that this case deals only with money because it
11 doesn't. So you can correct it in an appropriate
12 manner and you can do it so that we don't make a
13 major deal out of it, or I can correct it, and --
14 MR. BLEAKLEY: And would you tell us what
15 you would say if you corrected it?
16 THE COURT: No.
17 MR. BLEAKLEY: I think we're entitled to
18 that, Judge.
19 THE COURT: No. You correct the error, or
20 then I'll tell you what I'll say.
21 MR. BLEAKLEY: So I do it at my peril.
22 THE COURT: You do it at your peril.
23 MR. BLEAKLEY: And the language I use is at
24 my peril and I get no guidance from the court.
25 THE COURT: No. I want the jury to

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1 understand that there is more involved in this case
2 than money. Okay?
3 MR. BLEAKLEY: Can I tell the court that
4 you have asked me to clarify my remark, I mean tell
5 the jury that you have asked me to clarify my remark?
6 THE COURT: If you want to.
7 MR. BLEAKLEY: Can I tell the jury that you
8 have asked me to make it clear in the remarks that I
9 made yesterday that I was only talking about the
10 issue that you jurors have to decide, that there are
11 other issues in this case, and that the court will
12 tell you what they are?
13 THE COURT: If you clarify it in that
14 manner, you won't have a problem.
15 MR. CIRESI: Well, Your Honor, --
16 MR. BLEAKLEY: I will do it that way.
17 MR. CIRESI: -- there are issues that they
18 have to decide other than money. They have to decide
19 issues of whether they violated Minnesota laws. The
20 idea that they only have to decide money is totally
21 inappropriate because it does not state the correct
22 status of this case under the law and what the jury
23 is going to have to decide.
24 MR. BLEAKLEY: Well the jury has already
25 been told that and they'll be told that again in

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1 lengthy instructions that the court gives to the jury
2 at the conclusion of the case.
3 MR. CIRESI: And that's why, counsel, in my
4 judgment, you should not be arguing what the law is
5 or what they only have to decide. They will decide
6 the case under the instructions of the court. And
7 it's not only about money; they have many issues that
8 they will have to decide under the law, apart from

9 fact issues.
10 MR. BLEAKLEY: I think that's clear.
11 THE COURT: I've indicated what's
12 acceptable to the court.
13 MR. BLEAKLEY: If I said what I said a
14 minute ago, that would be acceptable to the court?
15 THE COURT: Sufficient so that I will not
16 intervene and give my own statement.
17 MR. MONICA: Your Honor, I assume that Mr.
18 Bleakley can take care of --
19 I know there's an objection that I said
20 something similar. Mr. Bleakley's one statement will
21 take care of it for both of us, I assume.
22 THE COURT: I don't care how you do it and
23 I don't care who does it. I just want it corrected.
24 MR. BLEAKLEY: If it is going to be done, I
25 think I should be the one to do it.

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1 THE COURT: Okay.
2 MR. CIRESI: One other issue, Your Honor.
3 When we agreed to them making separate arguments, we
4 did not agree that they could be repetitive in their
5 arguments. In fact we specifically stated they would
6 have to cover separate issues. Mr. Bleakley
7 yesterday covered, quote, common knowledge and what
8 the state knew and what the public knew. I suspect
9 that Mr. Bernick is going to go into that at lengths
10 today. That is contrary to the agreement you made
11 with the defendants with regard to splitting these up
12 among the major defendants so long as there was no
13 overlapping of issues. And we hear Mr. Bleakley
14 mention things Mr. Monica mentions, and I suspect
15 we're going to see a common theme of that among the
16 defendants, and that was not our agreement.
17 THE COURT: Okay. I think we've got enough
18 to do without repeating ourselves.
19 MR. BLEAKLEY: Believe me, we're going to
20 try. A little overlap is almost inevitable, but
21 believe me, we have tried to divide these subjects
22 up, and there will be very, very little overlap.
23 THE COURT: Okay. Just don't invite my
24 intervention. I like to have attorneys try their
25 case, but if you insist that I intervene, I will.

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1 Okay? So let's just get our opening statements in
2 and make certainly a good-faith effort to avoid any
3 overlapping. If you start repeating and repeating,
4 I'm going to stop you.
5 MR. BLEAKLEY: We won't. I just -- and I
6 will make the remarks that I made, but I do want to
7 make it clear on the record I object to having to
8 make those remarks. But I will do it.
9 THE COURT: Well that's fine. The record
10 will show your objection.
11 MR. BLEAKLEY: Okay. All right?
12 MR. WEBBER: David, are you -- did you
13 fix --

14 MR. BERNICK: Yeah, I think we're making
15 progress on that, Your Honor. I'm told that we are
16 very close to being ready. The computer system went
17 down and they had to bring a backup system in from
18 the hotel, so they have gone ahead and done that.
19 I'll be going first, and I take it that there's
20 been discussion about not repeating and overlapping,
21 and I think that I will -- I'll be able to do that.
22 Inevitably there are some references that I'll have
23 to make at the beginning just to get the jury focused
24 back on how these pieces fit together, but I will be
25 covering stuff that Mr. Bleakley did not cover, Mr.

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1 Monica did not cover and Mr. Webber will not cover.

2 MR. CIRESI: Well I just want the record to
3 reflect that from this point forward we will put on
4 the record what the agreements are, because the idea
5 that Mr. Bleakley can talk about common knowledge and
6 then to have a segue into the next argument, that Mr.
7 Bernick can do it and pound on it again is totally
8 unacceptable and contrary to the underlying rationale
9 that we had when we allowed them to make separate
10 opening statements. So from now on we'll put our
11 agreements on the record.

12 MR. BLEAKLEY: Just for the record, there
13 is no agreement; that is Mr. Ciresi's
14 characterization of the agreement.

15 MR. CIRESI: That's the problem.

16 THE COURT: Counsel, I don't care if
17 there's an agreement or not. Did you understand the
18 position of the court?

19 MR. BLEAKLEY: Absolutely. We are going to
20 do our very best to avoid overlap. We did so in our
21 planning of it, and we will do so in the delivery.

22 THE COURT: Okay. Just so you know where
23 I'm coming from. All right.

24 One other last thing: There are no stays.
25 Let's proceed.

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1 MR. BLEAKLEY: Your Honor, can I make --

2 MR. CORRIGAN: Your Honor, I have an
3 application.

4 THE COURT: There are no stays. Let's
5 proceed.

6 MR. CORRIGAN: I have an application beyond
7 that, Your Honor. Sorry.

8 THE COURT: Mr. -- yes.

9 MR. BLEAKLEY: I would like to be able to
10 do this maybe after Mr. Bernick because I want to
11 take a few minutes to make sure that I state this
12 very carefully, if that's all right, Your Honor.

13 THE COURT: Just so it's done sometime this
14 morning.

15 MR. BLEAKLEY: Just so it's done.

16 THE COURT: All right. Let's go --

17 MR. CORRIGAN: Your Honor, I have an
18 application.

19 THE COURT: What?
20 MR. CORRIGAN: I have an application on
21 behalf of B.A.T Industries. Can I be heard?
22 THE COURT: No. This is all I'm hearing
23 this morning.
24 MR. CORRIGAN: Your Honor, it relates to my
25 opening statement. We need to get --
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1 THE COURT: Relates to your opening
2 statement?
3 MR. CORRIGAN: Yes. And if it's going to
4 take place this morning, I need to make my
5 application before I make the opening statement. I
6 can do it at the next recess.
7 THE COURT: Do it at the next recess. Let
8 the clerk know what you have in mind.
9 MR. CORRIGAN: Just perhaps could I note --
10 I recognize Your Honor has already stated there are
11 no stays.
12 THE COURT: Yes.
13 MR. CORRIGAN: My first application was
14 going to be to ask you to recognize that there was,
15 so I would simply like to note my exception and ask
16 that the record reflect that further participation by
17 B.A.T Industries in the trial of the actions are over
18 objection in light of what Your Honor has said, that
19 there are no stays, since it's our position that an
20 automatic statutory stay is in effect as to B.A.T
21 Industries.
22 THE COURT: The record will show that.
23 MR. CORRIGAN: Thank you.
24 THE COURT: Proceed.
25 (In-chambers proceedings concluded.)

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1 (The following proceedings were held in
2 open court.)
3 THE CLERK: All rise. Ramsey County
4 District Court is now in session, the Honorable
5 Kenneth J. Fitzpatrick now presiding.
6 (Jury enters the courtroom.)
7 THE COURT: Good morning.
8 (Collective "Good morning.")
9 THE COURT: Counsel.
10 MR. BERNICK: Good morning. My name is
11 David Bernick. I don't think I had the opportunity
12 to ask very many of you questions during the
13 selection process, so I want to take this opportunity
14 to tell you a little bit about who I represent. I
15 represent a company called Brown & Williamson. I
16 don't know if many of you have heard about Brown &
17 Williamson. Brown & Williamson makes Kool
18 cigarettes. That's one of our brands. I also
19 represent American Tobacco Company. American is now
20 part of Brown & Williamson, they're part of the same
21 company. American has made Lucky Strikes; may be a
22 brand that you're familiar with.
23 Now I also represent a couple other companies

24 that you're -- I'm pretty confident you probably
25 don't know. One of them is called the
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1 British-American Tobacco Company. British-American
2 Tobacco is affiliated with/related to Brown &
3 Williamson. You'll hear a lot in this case about
4 British-American Tobacco Company or BATCo because
5 BATCo did a lot of research, and the research was
6 done/sponsored in part by Brown & Williamson and came
7 over to this country.

8 There's also another company I think you'll
9 probably hear very little about, which is B.A.T U.K.
10 & Export. I'm not going to spend a lot of time on
11 that this morning, but they're also another company
12 that is related to BATCo.

13 I'm going to take you back and tell you a little
14 bit about where my presentation fits into the
15 discussion you've heard so far. Mr. Bleakley talked
16 to you about the beginning of the smoking-and-health
17 controversy, and in particular back in the 1950s. At
18 that point in time the smoking-and-health controversy
19 was looming large, it was becoming a national event.

20 We had to change over our system this morning,
21 and the result is that the slides I'm going to show
22 you are slides that used to be on computer and
23 they're now here graphically. But they're basically
24 the same in content.

25 Mr. Bleakley talked to you about the state and
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1 what the state had done, and he particularly focused
2 on the role that the state had played in this
3 process. I'm going to take you back and I'm going to
4 talk to you about what the industry has done, and in
5 particular three basic things that the industry has
6 done over time.

7 The story that Mr. Ciresi told you for the state
8 was a story of documents, and it was a story of
9 attitudes that people had, what was on their minds,
10 and he showed you those documents and he said this is
11 what this industry is about, this is what this
12 industry has done for over 40 years. Look at the
13 attitudes, look at the objectives, look at the goals,
14 look at the intent of these people and believe as you
15 hear the evidence in this case for 40 years that the
16 evidence in this case reflects those attitudes, those
17 intents and those goals for the industry, and it's in
18 those documents.

19 Those documents were taken, as Mr. Ciresi said,
20 from a collection of literally millions of pages of
21 documents, and they say what they say, and you'll
22 hear about them. But you will have to reach a
23 judgment in this case not only about what attitudes
24 were in a particular document, but about what was
25 accomplished by this industry over time, what was

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1 actually done, and I'm here to tell you this morning
2 about what was done, what was done in connection with
3 these three basic areas of activity. And at the end
4 of the case you'll have to reach an assessment.
5 After all of the evidence is in you will have to
6 reach an assessment: Is the picture that Mr. Ciresi
7 showed you with those documents taken out of the 33
8 million pages, is that picture a complete picture, or
9 is there another picture that's more complete, a
10 picture that reflects the accomplishments of the
11 industry, what the industry actually did? And are
12 those accomplishments obscured by the fact that some
13 people at some points in time have had ideas and have
14 had attitudes? And those ideas and attitudes weren't
15 necessarily best, didn't necessarily reflect the best
16 kind of a judgment and aren't necessarily ideas or
17 attitudes that we would stand behind today and ask
18 that you endorse. That's the judgment that you'll
19 have to make.

20 So listen to the attitudes, look at the
21 documents, understand them. We're not going to walk
22 away from them. They are what they are. But think
23 to yourself now about what was actually accomplished,
24 what was actually done.

25 These three items, the research, the changes to
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1 the product, the defense of smoking, this is a road
2 map, this is a road map that you can use. And I'll
3 tell you where the road ends right now, then I'll go
4 back and explain exactly what path that road has
5 taken. But where does it end?

6 With regard to research, the story that was
7 told, the overview that was given to you by Mr.
8 Ciresi was research as an example of a broken
9 promise, a commitment was made and then it was
10 breached. In fact, his suggestion to you was at the
11 time the commitment was made there was never intent
12 to live up to it, that at the very time it was made
13 there was information that was not shared. And he's
14 also suggested to you that the industry, the
15 companies learned a lot about their product and then
16 didn't reveal it, that there were secrets, that there
17 were important secrets that were never revealed.

18 Our road ends at a different point than Mr.
19 Ciresi's road. Our road ends at the point where
20 research was done, the promises were kept. And I'll
21 show you how they were kept and then you will see no
22 important scientific secret, no silver bullet for the
23 smoking-and-health controversy that was somehow
24 closeted in within the confines of the tobacco
25 industry and was not known to other scientists, there

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1 will be no such important fact that would have made a
2 difference to choices that smokers made and choices
3 that the state made.

4 What about changes to the product? You heard an

5 argument about changes to the product that said this
6 industry was so hidebound, so dug into its ways that
7 the product wasn't essentially changed. Could have
8 been done, wasn't done. And the changes that were
9 made, they were illusory changes, they weren't real
10 changes. They were changes at the time to provide
11 reassurance, not reality. Reassurance, not reality.

12 We'll show you a different road, a road that
13 ends with intensive research to change the product,
14 with real changes that were made that had meaning and
15 that were directed and endorsed by public health
16 authorities. We'll talk to you about those changes.
17 Mr. Webber, who follows me, will deal with those.

18 What about the defense of smoking? That's
19 another area of activity. The industry sought to
20 preserve itself. Can't be a shocker. The industry
21 was under intense scrutiny, intense -- intense
22 attention as it has been for 40, 50 years. Did it
23 defend itself? It absolutely defended itself. It
24 sought to preserve itself and it sought to preserve
25 the rights of smokers to choose to continue to smoke.

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1 Now Mr. Ciresi's characterization of that road,
2 of that path, was it was a path of deceit, that our
3 very public positions were designed to mislead and in
4 fact did mislead people.

5 Our road is a different road. Our road is a
6 road paved with public facts, not private facts.
7 Public discussion of those facts, a debate and
8 discussion that the industry couldn't control. We
9 didn't even move the needle. Who was going to pay
10 attention to what the tobacco industry had to say?
11 There was a debate, there was a debate that we
12 participated in through public facts so that at the
13 end of the day, what could happen? At the end of the
14 day people who were watching that debate and
15 participating in that debate could make up their own
16 minds, make their own choices. That's where these
17 roads end.

18 Let me begin with research. Research was done.
19 You'll hear an awful lot about research, tremendous
20 amount of research. And before I talk to you about
21 what that -- what that evidence will show, I want to
22 give you a touchstone or a guideline to use because
23 you're probably sitting here saying well how can I
24 keep track of all this information, all these
25 articles, all of these thoughts? How do I go about

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1 doing that?

2 Here's a test. The test is this: The test is
3 borne of this case. Their case is that smokers were
4 deceived and the state was deceived. With that case,
5 with that claim, here is my test. If you find it
6 useful, use it; if you don't find it useful, cast it
7 aside. My test is this: As you hear about the
8 research, as you hear about what was done, ask
9 yourself: Would it have made a difference? Would it

10 have made a difference to smokers who had to make
11 choices, the state who had to make choices? And who
12 had heard -- I'm not going to go back through what
13 Mr. Bleakley covered -- who had heard two things,
14 just two things? Number one, smoking may be
15 hazardous to your health. Number one. Number two,
16 once you start, it may be hard to quit. That's not a
17 lot of technical stuff, it's not a lot of articles,
18 it's not a lot of research, it's basic, practical
19 wisdom. It's the kind of stuff that people rely on
20 when they make choices. You'd go a little eyewear
21 just thumbing through the annals of pharmacology.
22 You make choices on what you believe and what you
23 understand.

24 As you hear about that research, is there
25 anything that we knew that nobody else knew, some
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1 important fact that would have made a difference to
2 people who had heard these things? That's the test.
3 Now with that test, how do we stack up? What
4 actually occurred?

5 I'm going to try one more slide. If it doesn't
6 show up clearly, I may just abandon it altogether.

7 I don't know if -- Your Honor, I don't know --
8 may I inquire if the jury can read that on their
9 screen? Is that all right?

10 THE COURT: Can you read it?

11 (Affirmative response from some jurors.)

12 MR. BERNICK: Research was commenced, and
13 the first part -- there actually weren't one, but
14 several lines of research. The first, CTR research.
15 We've already heard a little bit about CTR. It's CTR
16 that led to the Frank Statement that Mr. Ciresi
17 talked to you about. And let me create a little bit
18 of the ground work of the Frank Statement.

19 The time is 1954. There's a big issue that's
20 out there, a scientific issue that's out there, the
21 claim that smoking causes disease. Companies know
22 they got to respond to that. They know that they
23 have to do research. Even the documents that Mr.
24 Ciresi showed you yesterday reflect the understanding
25 that research had to be done.

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1 Now I want to ask you, to put the question to
2 you: If the tobacco companies had gone ahead and
3 said, gee, we want to do this whole research program,
4 we're going to do it ourselves, so we go build all
5 the labs, hire all the scientists, all the
6 sophistication in the world is housed within the
7 tobacco industry and they start coming out with
8 reports and they start coming out with articles and
9 the articles say, gee, you know what? It turns out
10 maybe smoking doesn't cause disease. What do you
11 suppose people would have asked about those studies?
12 Suppose they might have asked, "Well, gosh, that's
13 just the tobacco industry research. How independent
14 really was it? How good was it? Who believes that?"

15 What if the studies had come out poorly for the
16 tobacco industry, smoking is not only established to
17 cause disease but there were problems with the study,
18 the companies' own scientists felt the studies were
19 flawed, and they would take out and they would write
20 down, "We think this -- we think these studies are
21 flawed studies." What do you think people would have
22 to say about those scientific criticisms? They'd
23 probably say, "Well gee, how do we pay attention to
24 those? They are the tobacco industry criticisms of
25 its own research. How can they disavow their own

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1 research?" Big problem.

2 The solution that was adopted by the industry
3 was announced publicly and openly. The solution
4 announced by the industry was to create an
5 independent mechanism for funding research done by
6 institutions that had no allegiance, no tie, not
7 beholdng to the industry.

8 So we got another problem. Who picks the
9 researchers? Who says I'm going to give you money
10 and not you money? Who goes ahead and does that?
11 Can't have the tobacco industry go do that. So not
12 only did they put the money for people who were on
13 the outside, at outside institutions, the tobacco
14 industry had to create a mechanism for going ahead
15 and selecting who gets the money. And that's what
16 this is all about. It's all about the commitments
17 that were made.

18 Let me focus first on the recitals. It says,
19 first of all, "Although conducted by doctors of
20 professional standing, these experiments" --
21 referring to the experiments that had occasioned the
22 publicity -- "are not regarded as conclusive in the
23 field of cancer research. However, we do not believe
24 that any serious medical research, even though its
25 results are inconclusive, should be disregarded or

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1 lightly dismissed." So they're reciting the fact
2 that the issue is out there. "We accept an interest
3 in people's health as a basic responsibility,
4 paramount to every other consideration in our
5 business.

6 "We believe the products we make are not
7 injurious to health."

8 Let me take both of those statements. The
9 second statement, made in good faith at the time,
10 wouldn't be made today given the way that it's
11 worded, but back then when the issue was -- when the
12 issue was where it was and science was where it
13 was -- Mr. Bleakley has reviewed it for you -- it was
14 a fair and good and an appropriate statement to make.

15 What about the statement about "paramount to
16 every other consideration in our business?"
17 "Paramount to every other consideration in our
18 business." Sounds kind of noble, sounds, well, we
19 believe we have -- and there is that dimension of it,

20 we did believe we had the responsibility. But just
21 think about it for a minute. This is not a situation
22 where there was a difference between what we had a
23 responsibility to do and what we had to do in our
24 business.

25 MR. CIRESI: Your Honor, I'm going to
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1 object to the argumentative form of the opening
2 statement.

3 THE COURT: I think maybe you should move
4 on, counsel.

5 MR. BERNICK: Thank you.

6 The evidence will show that there was no
7 inconsistency. Why? The evidence will show that the
8 marketplace was awash with this information. Mr.
9 Bleakley has already reviewed it to you. Our
10 customers were hearing these statements made about
11 smoking and health. If we wanted to do business with
12 our customers, if we wanted to be responsible, the
13 evidence will show that those two paths converged.
14 Doing the science was important for a responsibility
15 point of view, doing the science was critical to just
16 staying in business. If we didn't do it, if we
17 weren't responsive, where would our customers go?

18 So you see the statement "paramount to every
19 other consideration in our business," and you think
20 about what the tobacco industry actually did over
21 time in its business. Think about paramount not only
22 from a responsibility point of view, think about
23 paramount in the sense that this was the driving
24 issue that dominated the marketplace, that dominated
25 our business.

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1 MR. CIRESI: Your Honor, I -- I'm again
2 going to object.

3 MR. BERNICK: Your Honor, that's a
4 statement of fact.

5 THE COURT: Counsel.

6 MR. BERNICK: I'm sorry.

7 MR. CIRESI: I'm objecting to the form of
8 the argument. It's an opening statement, not a
9 closing argument.

10 THE COURT: You may proceed.

11 MR. BERNICK: Thank you.

12 Let's go on and take a look at the commitments
13 that were made. Commitments reflected the concept
14 that I've talked to you about. "We are pledging aid
15 and assistance to the research effort in all phases
16 of tobacco use and health. This joint financial aid
17 will of course be in addition to what's already being
18 contributed by individual companies." So the idea is
19 a commitment to fund. A commitment to fund.

20 Number two, "For this purpose we are
21 establishing a joint industry group consisting
22 initially of the undersigned. The group will be
23 known as the Tobacco Industry Research Committee."
24 The TIRC, later CTR. That was done.

25 Now, number three -- if I may zoom in on this a
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1 little bit more -- "In charge of the research
2 activities of the Committee will be a scientist of
3 unimpeachable integrity and national reputation. In
4 addition there will be an Advisory Board of
5 scientists disinterested in the cigarette industry.
6 A group of distinguished men from medicine, science,
7 and education will be invited to serve on this Board.
8 These scientists will advise the Committee on its
9 research activities." That was the commitment that
10 was made.

11 Here is the structure that that describes. The
12 tobacco companies created CTR. CTR had a board of
13 directors, it had a Scientific Advisory Board, and it
14 has a scientific director and a scientific staff.
15 Money was provided to independent scientists. What
16 was the role of the Scientific Advisory Board? It
17 was the Scientific Advisory Board that made the
18 recommendations on what research to follow.

19 Now in judging CTR and judging this enterprise,
20 let's take a look at the people who became a part of
21 it. Were these people who the tobacco industry had
22 simply selected that were not of stature or not of
23 quality? The evidence will show it's the contrary.
24 The scientific directors. First one, Dr. Clarence
25 Cook Little, president of the University of Michigan,

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1 president of the University of Maine, founder of the
2 Jackson Memorial Laboratory, managing director of the
3 American Society for Control of Cancer, now the
4 American Cancer Society. That's who the first
5 scientific director was. President of the American
6 Association for Cancer Research.

7 You can go on and talk about Dr. Gardner,
8 chairman of the department of anatomy for Yale
9 Medical School, president of the International Union
10 Against Cancer and so on, member of the National
11 Cancer Institute, a government organization focused
12 on cancer.

13 Sheldon Sommers, faculty member at Columbia,
14 Harvard and other medical schools. President of the
15 New York Pathological Society.

16 Dr. Glenn, president of Mount Sinai Medical
17 Center.

18 These were the scientific directors, these were
19 the people who were in charge of the administrative
20 organization.

21 What about the Scientific Advisory Board itself?
22 Were these people -- were these people that were
23 simply patsies of the tobacco industry, will do what
24 they want, or are these people that didn't have
25 stature? These were people that included folks who

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1 were on the National Cancer Institute itself. I
2 don't know if you can read that; I'll focus a little
3 bit on it. Paul Kotin, SAB member from 1954 to 1965,
4 chief of the carcinogenesis studies of the National
5 Cancer Institute. These kinds of people were the
6 kinds of people who were given the job of making
7 those recommendations to the industry about what
8 research to follow. These kinds of people. And
9 there are more them. You'll see again and again the
10 institutions that are represented here. University
11 of Chicago, University of South Carolina, Harvard
12 University, National Cancer Institute, prestigious
13 research organizations. These people were asked for
14 their views, asked for their recommendations, and the
15 work got funded.

16 Was it work that was confined geographically?
17 Can't see this very well. We funded institutions all
18 across the country to do this kind of research.

19 What about here in the state of Minnesota? Mayo
20 Clinic, University of Minnesota, a whole series of
21 researchers over time who got funding. Those were
22 the people whose work got done, those were the people
23 who were chosen to discharge the commitment, the
24 promise to do independent -- fund independent
25 research.

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1 How broad was this research program? Awarded
2 more than 284 million dollars in grant and contracts,
3 over 600 million dollars in today's dollars, funded
4 over 1365 projects for more than 1100 researchers.
5 Grantees published more than 6,000 publications.
6 Among the recipients were three Nobel Prize winners.

7 Now was this research that ended up being
8 favorable to the industry? Was this research that
9 ended up exonerating, kind of giving us a clean bill
10 of health, or was it independent research? Let's
11 take a look at some of the conclusions.

12 This is what one study concluded in 19 -- in
13 1961. "There's a significant relationship between
14 smoking and bronchogenic carcinoma." It's not what
15 we would like to see. It's what they found. It's
16 what they published.

17 "Significant decrease in birth weights of
18 infants born to mothers who smoke was found." Not
19 something that was good for us, it's not something
20 that exonerated our product.

21 "Chronic smokers are more likely to develop a
22 greater incidence of coronary disease at an earlier
23 age, and manifest a higher incidence of coronary
24 occlusion."

25 It's that kind of independence that came out of

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1 the independent research organization. Was it on
2 target? Was it relevant? Judge for yourselves by
3 the quotes.

4 The Surgeon General concluded that. The Surgeon
5 General's reports have included over 500 citations to

6 research that was funded by the tobacco industry
7 through CTR, 500 citations.

8 Now there are criticisms that have been lodged
9 against CTR in this case, and you'll hear them. You
10 heard them from Mr. Ciresi in his original statement
11 to you. I'm going to deal with them.

12 First he says this was a PR effort. Remember
13 Hill & Knowlton and the meetings and how do we
14 improve our image? This is all a PR effort. There's
15 truth to that statement. But think about it a bit.
16 Was it good PR or was it bad PR? The fundamental
17 concept was that of course there was a PR dimension.
18 This was a big public issue, it's a big public issue
19 today. The whole question is: How were we going to
20 respond to it? And the choice that was made was that
21 good science was the best PR, fully consistent with,
22 indeed precisely because of the information. Did we
23 recognize the public relations value? Sure we did,
24 absolutely. But it was only as good as the science
25 was good and as people believed that it had

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1 integrity.

2 That was the statement that was made by one of
3 the people who became responsible for the
4 administrative side of CTR in the mid-1970s. This is
5 a quote from Addison Yeaman, who in 1975 made the
6 following report. I don't know if you can read that.
7 I'll read it to you. "The Tobacco Industry Research
8 Committee was formed to meet a public relations need
9 and it was a PR gesture." Absolutely. But go on.
10 "It is my sober judgment that CTR, as it now
11 operates, is the best public relations asset you have
12 in the problem of tobacco and health. But the moment
13 CTR becomes, or the attempt is made to use it, as a
14 public relations instrumentality, your asset will
15 lose its value because it will have lost its
16 scientific integrity. End of sermon."

17 PR, absolutely. Good PR? It will be our
18 position, absolutely. Good PR driven by our ability
19 to create an organization that has scientific
20 integrity. As soon as it was lost, the PR failed.
21 Who would buy it? Who would pay attention to it? It
22 all depended on scientific integrity.

23 What about litigation value? Mr. Ciresi read
24 you a quote, "This is the best insurance money can
25 buy." Did it have value? Did CTR have value for

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1 litigation? Absolutely. What better way to describe
2 the responsibility of a company to an issue than to
3 do good science? Our position is, our position will
4 be and the evidence will show that good science is of
5 course what you would want to talk about if a
6 person's making a claim against you. Of course you
7 want to say yes, there was an issue, and yes, we
8 responded to it, and here is the response. Otherwise
9 you're in a situation where, according to this, we
10 should be saying, oh, well, we can't talk about CTR.

11 You say we've not been responsible. We're not going
12 to tell you about it. Of course we're going to tell
13 you about CTR. Of course it's going to have value.
14 Does that make it bad? Or is the fact that it
15 was going to be part of lawsuits mean that you have
16 to drive all the more clearly and unequivocally to
17 make sure that the science is good science? Doesn't
18 that make you improve? Doesn't that make you have a
19 higher standard rather than a lower standard?

20 Now there are also people who made scientific
21 criticisms of CTR. Company scientists said we don't
22 think it has value. Outside scientists from abroad
23 came in and said we don't think it has value. You
24 have to take a look at what their perspectives are.
25 Were they focused on the kind of research that CTR

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1 was doing or were they focused on other interests
2 they had for research that they would have liked to
3 see pursued? You will have to be the judge of that.

4 But a guide to you in making that judgment comes
5 back to the SAB. The decision about what research to
6 do, the recommendations more precisely about what
7 research to do were the recommendations not of the
8 tobacco industry, not of this scientist, not of
9 foreign scientists, it was the recommendations of
10 SAB.

11 And then watch what the Surgeon General has to
12 say. Why, if it was so irrelevant or it was so poor,
13 why did the Surgeon General see fit to give it such
14 stature, citation after citation after citation?

15 And then, finally, well, what about the lawyers?
16 Sometimes you will hear lawyers being critical of the
17 role of CTR, there were lawyers reviewing CTR as an
18 enterprise, but what you'll see at the end of the day
19 is, after all the discussion got done, CTR was
20 preserved. It was preserved. It was preserved in
21 the same form through which we committed to it back
22 in 1954.

23 Now you say, well, lawyers advised and lawyers'
24 criticisms is one thing. Did the lawyers tell the
25 SAB what they could do and what they couldn't do?

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1 Did they limit the SAB in what it could do and
2 couldn't do? And there will be one instance in which
3 that was true, and we will describe it to you, we
4 will tell you why it occurred. You will understand
5 why it occurred. And you'll also see that, even with
6 our explanation, what was the reaction?

7 There was a document that Mr. Ciresi showed you
8 yesterday. That's what Sheldon Sommers wrote
9 afterwards. "I think CTR should be renamed Counsel
10 for Legally Permitted Tobacco Research, CLIPT for
11 short." He was ticked off at those lawyers and what
12 they had done. You say well, we'll have to explain
13 why this occurred. And well, but here we are in
14 1978, CTR has been in existence for 24 years, and is
15 CTR comprised -- does it have an SAB that goes down

16 lightly from interference? No, the SAB didn't go
17 down lightly, no matter what the rationale was.
18 These were independent people with an independent job
19 and they weren't going to do it. They don't like
20 doing what the lawyers told them to do.

21 This document reflects an incident that we will
22 have to account for to you, but also reflects
23 something much, much more important, which was the
24 integrity of the SAB and how it reacted to what they
25 were told to do.

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1 So we have as our first element of the research
2 story CTR, and there's one other part of CTR that I
3 want to call to your attention, which is special
4 projects. I've described to you in the first part of
5 this, which is tobacco companies formed CTR, the SAB
6 reviews grants, makes recommendations, and then the
7 grants get funded. That's what I've been talking
8 about, that's the grant program is what it's called.
9 It's what we committed to in the Frank Statement.

10 Now I got another line here that says tobacco
11 companies, tobacco company lawyers, and then
12 scientific director, and then special projects. Well
13 what's that all about? Why are lawyers involved in
14 science? How is that appropriate for lawyers to be
15 kind of making suggestions about what to fund? How
16 can that be right? Well you will hear experts take
17 the stand who are scientists in this case -- and you
18 think about that a little bit. It doesn't come as an
19 awful lot surprise to you. Lawyers work with
20 scientists who are experts, it happens all the time.
21 What happened here was that the company lawyers
22 thought that certain research would be worthwhile to
23 do, but they also thought that the end point was not
24 simply testimony, they thought that the research was
25 of such high quality, potentially could be of such

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1 high quality that maybe it should be published, and
2 in order to go about funding research that met that
3 standard of quality -- not simply resulting in
4 testimony, but resulting in published scientific
5 research -- well there ought to be a mechanism to get
6 it done. So the CTR special projects were projects
7 that were funded through CTR with the approval of the
8 scientific director as special projects, but they
9 were not projects that had been recommended by the
10 SAB as part of the mainstream grant program and they
11 were not represented to be projects that were
12 recommended by the SAB pursuant to grant program.
13 CTR was simply used as an administrative vehicle in
14 funding the research.

15 What kinds of research got done? Here are some
16 of the institutions that were involved. Harvard
17 University, Georgetown, Berkeley, MIT, Yale
18 University. Top-quality research organizations were
19 used, were funded through special projects to go
20 ahead and do this work, and the work was published.

21 Was it work that was uniformly favorable? Was
22 it work that was only supported by us? Here are
23 other organizations that funded the same research.
24 Special projects, same projects. National Cancer
25 Research thought that research was pretty good. They

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1 said we'll co-fund that research. Was it research
2 that exonerated the industry? By no imagine -- by no
3 stretch of the imagination was that always -- was
4 that always true.

5 Look at this first one. Kind of a long quote.
6 At the end it says, "These studies demonstrate the
7 persistence of ETS," that's secondhand smoke,
8 "reactivity during a two-year period." That's not
9 something that was good for the tobacco industry,
10 that's not something that was good for our product.

11 What about the second? "These data suggested
12 that the odds in favor of lung cancer mortality were
13 influenced by smoking." Gee, that doesn't exonerate
14 the industry. So once we went ahead and funded this
15 research and it was getting done, special projects
16 even that the lawyers had recommended it, we had no
17 assurance it was going to get done and it was going
18 to come out with a result that was favorable to us.

19 The CTR grant program resulted in research that
20 was favorable, unfavorable. Special projects,
21 research favorable, unfavorable. Published research,
22 quality institutions, quality research and research
23 results.

24 Still the story isn't over. We had the grant
25 program, we had the special projects, we also had

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1 direct institutional grants. What do I mean by that?
2 Here is an example. We set up a program with the
3 AMA, the American Medical Association, 15 million
4 dollars, comprehensive research on smoking and
5 health; 219 separate research projects were done.
6 Did we control the results and the conclusions?
7 Research results, "Committee believes that the bulk
8 of research sponsored by this project supports the
9 contention that cigarette smoking plays a important
10 role in the development of chronic obstructive
11 pulmonary diseases."

12 When you go out and you fund independent
13 institutions and quality research, you have to be
14 prepared to live with the results. We went out and
15 funded the AMA, we went out and funded Harvard
16 University, we went out and funded Georgetown,
17 Washington University, we also went out and funded
18 UCLA, multi-million-dollar funding programs.
19 Hundreds of articles came out, often unfavorable to
20 the industry. And out of that whole process, after
21 all those institutions were saying you do your thing,
22 you'll hear of maybe one complaint by one scientist,
23 one complaint by one scientist, and it wasn't that he
24 couldn't get his results published, it wasn't that he
25 was constrained in what he could do, he was unhappy

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1 that the contract ended with Harvard University.
2 That wasn't -- it was what he was doing, and he kind
3 of blames the industry. Although when you read his
4 documents and his memos, it turns out that the
5 industry was prepared to give money, Harvard didn't
6 want tobacco money after a certain -- certain point,
7 didn't want to support the facilities necessary to do
8 the research, so the program was terminated.

9 Now how do you reconcile? You'll have to ask
10 yourself as this evidence comes in: Is it possible
11 to reconcile the picture that was painted to you in
12 the plaintiffs' opening statement about our attitude
13 toward research with our willingness, as you will see
14 in the evidence, to take these multi millions of
15 dollars and go to the most prestigious research
16 institutions in the entire country and say study our
17 product, publish your results, and you see the
18 results?

19 Now there's one more area of research that we
20 funded, one more way of funding research, but before
21 I talk about it, I want to take a step back. You've
22 now heard about all of these hundreds and thousands
23 of articles that were published, all this money being
24 spent on research. You may have reached the
25 conclusion that, gee, we were doing all the research,

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1 we were controlling the scientific process. It was
2 just us. And that brings me to want to talk about a
3 whole other area of research.

4 Smoking-and-health literature, outside published
5 research, research that we had nothing to do with, we
6 didn't fund, we didn't control, we didn't direct.
7 There was that research. Why?

8 1954, public issue. Does anyone believe that
9 the medical, scientific and public health community
10 was going to let the tobacco industry control the
11 show? You have to ask yourself that. And what
12 you'll see is that, huh-uh, that wasn't going to
13 happen. The volume and extent of the response of the
14 medical and scientific community, you will see, was
15 huge. Everybody started to focus on this issue.
16 Wide publicity over the studies, public-health issue,
17 public-health response.

18 If you just go to the Surgeon General's
19 collection of articles that had been published over
20 time, just that one collection, what you'd find out
21 is that by the end of 19 -- I think 1964 there were
22 7,000 articles, publications in the open scientific
23 literature, all about smoking and health. By 1979
24 there were 39,000 of those. By 1989 there were
25 57,000 articles in the scientific literature, 57,000

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1 articles, a huge, massive scientific undertaking. We

2 funded, in the hands of people we didn't control, we
3 funded a sliver of that research. Not a small one,
4 but a sliver. And not only that, but did the tobacco
5 industry control the take or the scientific
6 characterization of what all that information meant?
7 Did the tobacco industry kind of interpret it and
8 control what scientists thought about it? Huh-uh.
9 Whole compendia, collections were turned out.

10 This is 1961, Haag, Silvette & Larson, thousands
11 of pages reviewing the scope of tobacco-related
12 research. That was volume one. Volume two. They
13 came out every few years. Volume three. Volume
14 four, same thing, reviewing, compiling all of this
15 literature.

16 Now this was funded by the tobacco industry to
17 recite, collect and share what was known, but that
18 wasn't good enough for the public health community.
19 The Surgeon General of the United States decided
20 we're going to do that, we're going to take all of
21 this literature that's coming out and we're going to
22 tell you what it means. And the reports started to
23 come out. There wasn't just one, there was two --
24 this whole cart is filled with 24 surgeon generals
25 reports citing tens of thousands of articles in the

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1 scientific literature, compiling, interpreting them,
2 in order to develop public health policy that was in
3 no way dependent upon or controlled by the tobacco
4 industry.

5 We were not driving this car. We were not
6 steering the ship. It was out of our hands. It was
7 in the hands of people who were responsible for
8 public health, who wanted to deal with this issue
9 because it was so big and so important.

10 What kind of research was it? They did
11 epidemiological. You'll hear a lot about that.
12 That's the study of groups to see, gee, do smokers
13 get sick more frequently than non-smokers? They are
14 statistical analyses, sometimes very sophisticated
15 statistical analyses. There was toxicology. Can we
16 replicate human-type cancers in laboratory animals?
17 There was microbiology. Can we find a mechanism for
18 the causation of cancer? There was smoke chemistry.
19 What's in smoke? Is it carcinogenic? We'll talk
20 about that in a minute. What are all the
21 thousands -- you know, there are thousands of
22 chemicals in smoke, many of them in incredibly minute
23 amounts, but you can isolate them, and people
24 isolated them. So you get this literature that's
25 developing, interpreted totally separate and apart

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1 from the bottom part of the chart, which is the
2 internal research.

3 What about the internal research? Internally
4 the companies -- and this is the last area of
5 research that I want to describe for you --
6 internally the companies did do research. What was

7 the nature of the research it did? Well a lot of it
8 was focused on, at the end, smoke chemistry and
9 toxicology. Why? Because the companies felt that
10 the focus of their research for the most part should
11 be on what they knew best, which was the product
12 itself, understanding its chemistry, understanding
13 how it might behave in a laboratory setting. So a
14 whole series of studies got done over time. Smoke
15 chemistry work was done from a very early point in
16 time, probably before the 1950s, but certainly in the
17 '50s. Later on they started doing mouse
18 skin-painting experiments. Mouse skin-painting was
19 described to you -- this is a technique where
20 condensate of tar is painted on the backs of mice,
21 shaved back, painted on the backs, see if tumors
22 develop. Later on people started to become more
23 sophisticated and they did inhalation experiments
24 where, instead of working with a condensate -- a
25 condensate is not smoke, it's a -- it's a material

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1 that's derived from smoke and it's much more intense
2 and much more highly concentrated. Well what happens
3 when you have animals just inhale the smoke like
4 people do? Those were inhalation experiments.

5 And then there were Ames tests that were done.
6 These were tests of mutagenicity. These are tests to
7 determine whether exposure of the material alters the
8 way the cells grow or replicate. It was a technique
9 that was developed in the more recent times.

10 Now with all this internal research, how did it
11 develop, how did it unfold, what did it show? Well
12 first of all on smoke chemistry, let me describe
13 first the sequence and then whether there was
14 something new.

15 Smoke chemistry began in this early period of
16 time. As Mr. Ciresi has said, back in this early
17 period of time the focus of the companies' internal
18 research was not on biology or biological effects,
19 that was being done through CTR, it was on smoke
20 chemistry. As time went on, though, what happened
21 was -- was -- was interesting. What happened was
22 that outside health authorities began to focus on
23 these types of tests here in order to determine
24 whether products might be improved in some way, and
25 there started to be a commercial dimension or product

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1 dimension of biological research. Some of the
2 companies -- American Tobacco Company, you saw the
3 memo -- American Tobacco decided not to pursue this
4 research internally. You might have drawn the
5 conclusion from the memo that was shown to you, well,
6 American just decided not to do any research, and
7 that would have been wrong because American was in a
8 position where it was already doing research, it was
9 doing the research at the Medical College of
10 Virginia. The issue in that memo was not whether to
11 do research, it was where to do the research, and the

12 author was concerned with the appearance and with the
13 litigation risks that would be created by moving it
14 in house whereas that had not been done before. But
15 part of the reason why that was just a litigation
16 issue and not a scientific issue, the evidence will
17 show, was that research already was being done, had
18 been done for years through the Medical College of
19 Virginia, and every year the Medical College of
20 Virginia would turn out a report of the presentations
21 that had been made publicly, the papers that had been
22 published, including papers like "The Pharmacology of
23 Nicotine." So American had a unique relationship
24 with the Medical College of Virginia, a relationship
25 long pre-dating that memo. And they continued. And

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1 that's what they had decided to do, not to stop doing
2 research or not to do research, but to do it there
3 where it was external, where nobody could quarrel
4 with the integrity of the institution or the quality
5 of the work or try to somehow use it in the
6 litigation process. That was the decision that was
7 taken.

8 But American's approach wasn't necessarily the
9 approach of other companies. For example, BATCo, one
10 of my clients, BATCo actually went ahead and opened
11 up a biological research laboratory in England in
12 1957 at Southampton. B&W funded that research
13 together with other tobacco companies that were
14 related and Southampton went ahead. Over time they
15 did mouse skin-painting experiments, they did
16 inhalation experiments and they did Ames experiments
17 internally. And other companies over time did
18 biological research internally as well.

19 So the internal biological research grew as it
20 started to be product related and commercially
21 driven. CTR still had it done, but internal research
22 was done as well. So the idea that, oh, we decided
23 not to do internal research, you will see the
24 evidence doesn't support that.

25 Well now was there something that came out of

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1 that research that was unique, that we knew only
2 internally and didn't tell anybody? I want to deal
3 with that for just a moment. I'll get the right
4 folder out here and then I will be able to -- here we
5 go.

6 There was some talk yesterday about the fact
7 that in 1952 or 1953 we came to understand that the
8 smoke chemistry included a chemical called BAP,
9 benz(a)pyrene, and this is the document that -- one
10 of the documents that was referred to, "Carcinogens
11 Identified in Tobacco Substance," and it's a Reynolds
12 document, February 1953. It was suggested to you
13 that we decided not to tell anybody about BAP.
14 Remember that? Didn't tell anyone else about BAP.
15 And B&W -- B&W didn't tell anybody about BAP either.
16 1953, just as we were making the Frank Statement

17 promise, we weren't sharing that information.
18 Was that secret information? Was that
19 information that nobody knew?
20 If you take a look at the document itself, the
21 document itself says in 1941 Rothwell reported
22 isolation of benz(a)pyrene in the pyrolyzed
23 distillates of tobacco. This was a find made in 1941
24 and published. It was simply being replicated.

25 Benz(a)pyrene was well known to be a part of the
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1 chemicals in smoke. Indeed, the Surgeon General in
2 1964 recites that. When did we learn, when did the
3 world learn about benz(a)pyrene? 1933 it was
4 published. So we're talking about a smoke
5 constituent that by 1953 had been known to the
6 scientific literature, published in the scientific
7 literature for 20 years. And when it made its way
8 into the Surgeon General's report, it got special
9 treatment. Everybody knew about benzpyrene.

10 This is the '64 report of the Surgeon General.
11 The number one item: benzpyrene.

12 Now you have to understand you're talking here
13 about very small quantities. This is an amount
14 reported in micrograms per 1,000 cigarettes. Fifteen
15 micrograms per 1,000 cigarettes means, per cigarette,
16 you have to take a thousandth of 15 micrograms, which
17 would be 15 one-thousand one-thousandths. We're
18 talking about very small quantities of chemicals.

19 Are they carcinogenic? Yes, they are. What
20 does "carcinogenic" mean? It means that in
21 sufficient quantities they have been shown to produce
22 cancers in laboratory animals. That doesn't mean
23 they're carcinogenic for people, it doesn't even mean
24 that they're carcinogenic, the evidence will show,
25 for animals in the levels in which they actually

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1 occur in cigarettes. So you could have a table of
2 hundreds of carcinogens -- they can be in smoke, they
3 can be in foods, yet any number of different things,
4 it doesn't mean that they cause cancer in people, it
5 means we're going to pay special attention to those
6 things. And what you will not hear is that anybody
7 has linked up any one of the hundreds of carcinogens
8 that Mr. Ciresi has talked about. No one has ever
9 been able to find one of those that is present in
10 sufficient amounts in cigarette smoke to cause
11 human-type cancers in animals. So we could gather
12 all the information in the world that we want of
13 carcinogens in smoke; they're well known, they're
14 well documented, they're public. It doesn't answer
15 the question of what is it in smoke that may be
16 responsible for the increased incidence of disease.

17 This is a very old, old subject in tobacco smoke
18 chemistry. It's not a revelation, it's not some
19 important, new, silver-bullet fact that only emerged
20 in the context of this litigation.

21 What about mouse skin-painting? What did we

22 find about mouse skin-painting? We found that mouse
23 skin-painting in fact produces tumors on the backs of
24 mice. Was that a revelation? No. 1950s, Wynder
25 produced that first result in a published paper.

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1 That's one of the things that created the whole
2 controversy to begin with.

3 What about inhalation studies? All kinds of
4 inhalation studies already had been done and
5 continued from that point forward.

6 What about Ames testing? All kinds of Ames
7 testing had been published.

8 What actually was occurring here was that the
9 industry was taking techniques that had been known,
10 established and published by outside scientists and
11 they were applying those techniques to cigarettes
12 that they were making to see is there something we
13 might be able to change that would produce a better
14 result? That's why all this research got done.

15 Not revealing research. There's no deep, dark
16 secret that would have made any difference to
17 smokers. Mr. Webber will tell you what actually
18 happened as a result of this research, what the
19 results were, what changes were made.

20 What was it that was learned as a result of all
21 of this research that I've described for you? First
22 there was the statistics, the epidemiology. What was
23 learned as a result of all the research? They
24 published independent, you know, funded by the
25 tobacco, whatever. What was learned was that there

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1 was an increased risk of incidence of disease among
2 smokers. People who smoke more frequently get sick.
3 It's been known since the early 1950s. It's been
4 uniform.

5 What about smoke chemistry? Has anyone managed
6 to isolate the particular chemical in smoke that's
7 linked to this increase? No one has been able to do
8 that. Lot of candidates. No one's been able to
9 actually link one up and say this is it. Lot of
10 theories, lot of possibilities, it just has not
11 actually occurred.

12 There was a report last year -- in 1996, an
13 article that came out that tried to do that. It said
14 for the very first time somebody has managed to do
15 it. Not so.

16 Animal test toxicology. Has it been possible to
17 replicate in the laboratory human-type lung cancer on
18 exposure to whole smoke? If you put an animal in a
19 cage, expose him to whole smoke through the lifetime
20 of the animals, do you get lung cancers in
21 significant numbers consistently? Not consistent,
22 significant lung cancers. Bronchogenic carcinoma, we
23 could show you the Surgeon General said this in 1982,
24 recognized it in 1982.

25 What about the biological mechanism for the
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1 causation of cancer from smoking, has that been
2 established, proven up? Not known. We don't know
3 what causes cancer. We don't -- can't trace the
4 mechanism 1, 2, 3, 4, 5, 6, 7. We know an awful lot
5 about it, but all the links are not in place.

6 Now what does all this add up to? What is what
7 everybody likes to call the bottom line? Does this
8 mean that, oh, well gee, you know, we don't know all
9 this stuff, but smoking, why do we do it? What are
10 we here for? The answer is absolutely not.

11 This statistical evidence is very important. It
12 says a fact which is that people who smoke more often
13 get sick. There is clinical pathology evidence of
14 changes that take place in smokers. I'm sure you'll
15 hear extensive evidence from the plaintiffs' experts
16 of all the changes that are produced in the smoker
17 from smoking. Those are meaningful, important facts.
18 There are also things that are missing in the
19 equation. Is the bottom line anything
20 different -- common-sense, practical bottom line
21 anything different from this? Smoking may be
22 hazardous to your health. Is it something that would
23 have made a difference to smokers in making a choice
24 if we add all of that up and draw a conclusion?
25 That's what you'll have to decide.

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1 What about nicotine? Mr. Ciresi gave you a
2 whole series of documents talking about what the
3 companies knew about nicotine. I'm going to fill out
4 the bottom of the chart, bottom part of the chart
5 first. What was the internal research that he
6 described to you?

7 I'm sorry, Your Honor, would it -- am I --
8 Would it be time for a break, or should I
9 continue on?

10 THE COURT: Probably.

11 MR. BERNICK: Okay.

12 THE COURT: Is this a good time?

13 MR. BERNICK: This is just fine.

14 THE COURT: Okay. Let's take a short
15 recess.

16 THE CLERK: Court stands in recess.
17 (Recess taken.)

18 THE CLERK: All rise. Court is again in
19 session.

20 (Jury enters the courtroom.)

21 THE CLERK: Please be seated.

22 THE COURT: Members of the jury, counsel
23 for Philip Morris and Lorillard stated yesterday
24 during opening statements that, quote, "This lawsuit
25 is about money," unquote. This statement is not

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1 complete. As I instructed you yesterday before the
2 commencement of opening statements, plaintiffs claim

3 that defendants' conduct violated Minnesota law. I
4 further instructed you that the plaintiffs seek to
5 recover health-care expenses to treat diseases caused
6 by smoking as well as other relief.

7 At the conclusion of the evidence you will be
8 called upon to evaluate the evidence and apply the
9 law as I instruct you at the end of the case.

10 Proceed, counsel.

11 MR. BERNICK: Thank you, Your Honor.

12 I hope -- I hope you -- if you have problems
13 hearing, I know there's a little bit of an echo,
14 maybe you could inform the court, but I'll -- I'll
15 proceed as if you can hear me okay until somebody
16 says something. We've had some technical problems
17 with the microphone, if that's all right.

18 I think where we left off was talking about
19 nicotine, and nicotine was a very central focus in
20 what the state had to say to you. There's a lot of,
21 in a sense, emotion that gets created about nicotine,
22 and Mr. Ciresi likened certain forms of nicotine to
23 free based hard drugs or -- I forget what it was,
24 crack cocaine or something to that effect. Nicotine
25 also triggers in people's minds addiction, and

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1 because it's a drug that has pharmacological effects,
2 said to be addictive, and again that invokes all of
3 these feelings of hard drugs. And what I'm going to
4 talk to you about is what our internal research
5 showed and you're going to have to ask yourselves as
6 you listen to that and as you listen to the evidence
7 in the case: Are the facts -- what are the facts,
8 and do they warrant that kind of emotional response,
9 those types of emotional labels, or are we doing --
10 dealing with something that's very, very different?
11 And that's what you'll have to decide.

12 So I'm going to try to take you a little bit
13 step back to the labels and deal with the facts, the
14 underlying facts about nicotine and about addiction
15 and about quitting.

16 Remember the test that I proposed to you
17 originally? Second part of it is once you start, it
18 can be hard to quit. I'm going to talk about that
19 part of the test. Once you start, it's going to be
20 hard to quit. Why?

21 Now I think where we left off in particular
22 is -- I've put another board up here to deal with
23 what had been said about our internal research, like
24 this one here, only now focused on nicotine instead.
25 Going to do the same kind of thing to put into

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1 perspective what it is that we said and did.

2 Mr. Ciresi in his opening statement talked first
3 of all about the fact that nicotine is a drug, it has
4 pharmacological effects, and that our own internal
5 documents recognized what I'll put here as nicotine
6 pharmacology. Then there was another document
7 where -- let me take a step back.

8 Nicotine pharmacology. Pharmacology,
9 pharmacological effects. Pharmacological effects,
10 you will hear, are any kind of effects on people's
11 nervous system or really any other system in their
12 body that are induced chemically. If a material --
13 chemical material causes a change in your body,
14 that's a pharmacological effect.

15 Nicotine has pharmacological effects. It won't
16 be disputed in this case. Many, many, many, many
17 other things have pharmacological effects. Almost
18 anything that you take into your body that causes you
19 to feel or maybe act in any number of different ways
20 has got pharmacological effects. Coffee does.
21 Water, if you're thirsty, has pharmacological
22 effects. Watching TV has pharmacological effects.
23 Nicotine has got pharmacological effects.

24 Because it has those effects, it is a drug. A
25 drug is a substance that you take that has

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1 pharmacological effects. Everyone asks what are
2 those effects and what relationship do they have to
3 people's choices and behavior? That's what we're up
4 against here. Pharmacological effects, no dispute.
5 Nobody has a dispute.

6 Another thing you heard discussed was titration.
7 Didn't really kind of have that name, but what I'm
8 referring to is the documents that talk about a
9 particular kind of pharmacological effect and
10 behavior, and it's called technically titration.
11 What that means is that people want to have a certain
12 dose, a dose specific is the claim that was made.
13 There were some documents, and I'll show them to
14 you, people smoke for a particular dose of nicotine.
15 That's called titration, seeking a dose.

16 Titration is actually a process of producing a
17 concentration of a chemical in a solution. Titration
18 for nicotine is looking for that concentration as a
19 person who smokes. That's titration.

20 Compensation is something else that was referred
21 to. Compensation -- I'll go over this again in a
22 minute -- is where, in order to get that particular
23 dose, the idea is that you will smoke more or less
24 depending upon the kind of cigarette that you have.
25 It refers to smoking behavior that's designed to get

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1 that nicotine dose. That's the concept of
2 compensation.

3 There were references to tar-and-nicotine
4 ratios, research about changing the ratio of tar and
5 nicotine to give you -- give people more nicotine.
6 That is in our documents. And then finally, there
7 was discussion of pH and ammonia, changing the
8 chemical form of nicotine so that it's more readily
9 available. That was -- again we go back about this,
10 but these are all of the things that were pulled out
11 of our documents and seeing what these people knew
12 about nicotine. "What did they know, when did they

13 know it," I think were the words that were used. And
14 the argument that was made was that we knew all of
15 these really important facts about nicotine and we
16 put them into our product and we acted on them and
17 didn't tell anybody. That's the argument that was
18 made. And I'm going to give you an overview and just
19 a couple examples of how wrong that is. I'm going to
20 show you that not only was there no secret that we
21 had about nicotine that would have made a difference
22 to smokers and their choices, but I'm also going to
23 show you that many of the things that we did, indeed
24 every single thing here was related to suggestions
25 that had been made by public health authorities who

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1 were concerned about the health effects of nicotine.
2 They were responsive to outside concerns about the
3 health effects of nicotine -- I mean of smoking. The
4 nicotine research was tied to what the public health
5 authorities were saying about smoking. I'm going to
6 show you exactly how.

7 This research was responsive research, it was
8 not some secret research on concepts that nobody else
9 knew about. It was a response to what public health
10 authorities had to say. May come as a surprise, but
11 we're going to show you. We're going to show you in
12 the documents and in the pronouncements of these
13 public health authorities.

14 First let me work a little bit with
15 pharmacological effects. Is there any secret, is it
16 known only to people in the tobacco industry that
17 nicotine has got pharmacological effects? Absolutely
18 not. If you read on the screen it says, "That
19 tobacco is endowed with pharmacological
20 activity" -- this is an outside publication by a very
21 well-known authority in the field of nicotine and
22 smoking behavior -- "That tobacco is endowed with a
23 pharmacological activity has been known for
24 centuries." You'll see the literature references and
25 you'll see the studies. Everybody always has known

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1 that nicotine has got pharmacological effects. Well-
2 documented in the literature.

3 "That persons who use tobacco may become
4 compulsive users as may persons who use alcohol and
5 opiates also has been recognized for at least 200
6 years." In the published literature. So we're
7 talking about nicotine pharmacology in the outside
8 published literature recognizing that nicotine is a
9 drug with pharmacological effects is actually off
10 this chart, at least 200 years old. It's that old,
11 it's that well-known.

12 Well we ended up doing nicotine pharmacology
13 work and sponsoring that kind of research. Why would
14 we do it way back in the '50s and the early '60s?
15 Why would we do this kind of research if the effects
16 were so well-known? This now gets to the responsive
17 aspects.

18 Remember in the 1950s there was an attack by the
19 public health authorities on tar? Tar was under
20 fire, no pun intended, and one of the reasons that
21 nicotine pharmacology research got done was the
22 feeling of some of the companies, including BATCo, my
23 client, was that there were benefits of nicotine. It
24 was important to talk about the benefits of nicotine,
25 the benefits of the smoking experience in order to

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1 have -- in order, really, and initially, they were
2 thinking of producing an alternative smoking device
3 that would produce mostly just nicotine without the
4 tar. So this whole subject was a response to the
5 attack on tar. Let's do research on nicotine and the
6 benefits of nicotine.

7 Now this research expanded over time. It became
8 outside-conducted research in England funded by The
9 Tobacco Research Council, the TRC. The nicotine
10 pharmacology research that came out of that program,
11 the TRC research, was published. Nicotine
12 pharmacology work done at the Medical College of
13 Virginia sponsored by American Tobacco, much of it
14 was presented and published.

15 The pharmacology of nicotine was intensively
16 being studied and the tobacco companies and their
17 funded research actually contributed substantially to
18 what scientists in the outside world knew about the
19 pharmacology of nicotine. Been studied a lot, will
20 be studied some more. There was no secret about the
21 pharmacological effects of nicotine, there was no
22 secret about the fact that we were doing this kind of
23 research. We shared the results. Not all of the
24 results, but the results that were felt to be of
25 publishable quality and would contribute to ongoing

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1 scientific knowledge were openly shared. They will
2 be cited in this case by publications that the
3 plaintiffs' own experts will rely upon.

4 What about nicotine titration? Remember that's
5 that people want to get a certain dose of nicotine.
6 That was this paper here, and it was presented by Mr.
7 Ciresi, "The Nature of Tobacco Business on the
8 Crucial Role of Nicotine Therein." Remember he
9 showed you the page that says, "Our industry" --
10 let's see if I can get this right -- "Our industry is
11 therefore based upon design and manufacture and sale
12 of attractive dosages of nicotine" -- that's nicotine
13 titration -- "and our company's position in our
14 industry is determined by our ability to produce
15 dosage forms of nicotine which have more overall
16 value, tangible or intangible, to the consumer than
17 those of our competitors."

18 People titrate, seek a dose of nicotine. Oh?
19 Was that some secret, that nobody else knew about
20 that? Was that just something that we invented or
21 created or thought of?

22 Here's an article, 1942, The Lancet, one of the

23 most prestigious medical journals in the world.
24 1942. And it contains an article and an experiment
25 by Johnston. Again this is in literature that the
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1 plaintiffs' own experts have reviewed and have cited.
2 Look what he said. "On the assumption that smoking
3 tobacco is essentially a means of administering
4 nicotine, just as smoking opium is a means of
5 administering morphine, nicotine was given
6 hypodermically to 35 volunteers in known doses with a
7 view to comparing its effects, and particularly its
8 psychic effects, with those of tobacco smoking."

9 Here was the experiment. Volunteers got
10 intravenous nicotine, and then the question was would
11 they smoke fewer cigarettes because they were getting
12 the nicotine intravenously. And the theory that
13 drove that experiment was the titration theory, that
14 people smoked to titrate for nicotine. So you have
15 Johnston pursuing exactly the same theory back in
16 1942 and reporting his results.

17 This experiment was reconducted in 1967 -- this
18 is an article by Luchese, "The Role of Nicotine as a
19 Determinant of Cigarette Smoking Frequency in Man
20 with Observations of Certain Cardiovascular Effects
21 with -- Associated with the Alkaloid." This was
22 going to pursue this same theory. Interestingly, who
23 sponsored this study? Study was supported by a
24 research grant from the American Medical -- American
25 Medical Association Research and Education

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1 Foundation, Committee for Research on Tobacco and
2 Health. Remember the AMA ERS that I said the
3 industry funded with an independent 15-million-dollar
4 grant? That money went to this study all about the
5 role of nicotine. Out there in the open literature.

6 What did Dr. Luchese do? He basically
7 replicated Johnston's experiment. "The results
8 obtained suggest that nicotine plays a small but
9 significant role in the smoking habit and that part
10 of the craving for a cigarette can be satisfied by
11 the intravenous administration of the alkaloid. This
12 was manifested by a reduction in the number of
13 cigarettes consumed and by a reduction in the amount
14 of each cigarette smoked by subjects receiving
15 intravenous nicotine." And he cites back to the
16 Johnston study and similar studies.

17 We've got 1967, the titration theory is under
18 active consideration and the tobacco industry
19 actually is funding published research that openly
20 pursues exactly the same subject that was in Mr.
21 Teague's memo.

22 Here's another one, Nature Magazine, January
23 1968. It's a publication out of London. And who is
24 it by? "Pharmacological Basis for the Tobacco
25 Smoking Habit." And you take a look at the authors,

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1 Armitage, Hall and Morrison, Department of
2 Pharmacology, Tobacco Research Council Laboratories
3 in Harrogate. Remember I talked about the TRC? This
4 was work that came out of the TRC by Armitage and
5 others. Very well known and highly regarded
6 pharmacologist. What did he do? He pursued the same
7 basic theories, and this is what he ended up saying
8 right here. "If the average man weighs 70 kilograms,
9 every time he inhales a puff of tobacco smoke he can
10 be expected to receive a dose of nicotine roughly
11 equivalent to between one and two micrograms per
12 kilogram administered intravenously. It is worth
13 noting that someone smoking a cigarette has literally
14 fingertip control of how much nicotine he takes into
15 the mouth; by reducing the puff volume or inhaling
16 less frequently, he absorbs less nicotine.

17 "It seems likely that some people smoke in order
18 to dose themselves with nicotine, and our particular
19 concern has been to find out what effect these small
20 amounts of nicotine have on a smoker."

21 It's the titration theory. It is openly
22 pursued, funded by the tobacco industry, it's in the
23 public literature.

24 Why is Teague talking about titration
25 internally? Because all these articles are coming

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1 out specifically discussing exactly this theory.
2 What tobacco company in the face of published
3 research saying here's why people use your product
4 and here's how they use the product, what tobacco
5 company scientist wouldn't write a memo talking about
6 exactly the same thing? Of course he would. It's
7 being pursued, it's a theory of why people smoke.

8 What about compensation? Compensation is a
9 little bit different but somewhat similar. Here's a
10 chart. I'm not going to talk to you about the
11 details of the chart because Mr. Webber will, but the
12 reason it's here is to deal with compensation, which
13 is a subject I'm going to cover that relates to
14 nicotine. This shows what was happening to tar
15 deliveries over time.

16 Back in 1955 the sales weighted average of tar
17 deliveries was about 36 milligrams. This is an FTC
18 measurement of how much tar comes out of the
19 cigarette under controlled experimental conditions.
20 You can see that over time the amount of tar has
21 dropped, indeed dramatically, and Mr. Webber will
22 describe to you why that has been so. The deliveries
23 have fallen. And here's the question: If nicotine
24 is following tar down like this -- watch my finger,
25 it's coming down and down and down -- but people

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1 smoke for a dose of nicotine, doesn't that mean that
2 if the person's using a low delivery cigarette,
3 you'll have to smoke more and harder to get the same

4 dose? That's what you'd think. That would be called
5 compensation. People take those low delivery
6 cigarettes and they puff them more and puff them
7 harder. Compensation.

8 That was a theory that was discussed internally.
9 There was a theory about how people would respond to
10 low delivery products. Was it some secret? Again
11 take a look at the studies. This is puffing
12 frequency in nicotine intake in cigarette smokers,
13 it's by Heather Ashton and Watson, and you'll see who
14 they are in a minute. What did they do? They
15 basically determined that with people who are smoking
16 more heavily filtered cigarettes, look what happens,
17 "The results are compatible with the possibility that
18 smokers automatically adjust the nicotine dose
19 obtained from a cigarette to some optimum level which
20 may vary with different activities." They smoke
21 more -- more -- more puffs. So this theory is that
22 people are compensating for low delivery, titrating
23 up to their basic dose of nicotine. Published in the
24 open literature 1970.

25 Who were these people? This work was supported

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1 by a grant from The Tobacco Research Council. This
2 was more TRC research. Compensation was an openly-
3 pursued subject by Ashton and many others in the late
4 '60s and early 1970s. Again, what company wouldn't
5 look into exactly the same fact?

6 Now this didn't just stand where it was, it went
7 on. Because remember, going back to our little chart
8 here, if people are smoking the same -- a low
9 delivery cigarette more to get more, how is it low
10 delivery any more? Isn't it really a higher delivery
11 cigarette for them? Okay?

12 The public health authorities said, well gee, if
13 there's really compensation, we want people to use
14 lower delivery cigarettes, how can we encourage them
15 to do that? How can we keep the low delivery
16 cigarettes low delivery if people are trying to get
17 more -- smoking it harder or smoking it more
18 frequently to get that nicotine? Somebody had the
19 bright idea, said well, I'll tell you what, instead
20 of having the nicotine drop along with the tar, what
21 if you produce cigarettes that maintain the same
22 level of nicotine, kind of a medium nicotine, but low
23 tar? That way, if compensation is true, titration is
24 true, they get their nicotine dose but with a lower
25 delivery cigarette. Public health authorities want

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1 low delivery cigarettes. Mr. Webber will talk to you
2 about that. This is a suggestion of how to go about
3 doing that even though there's compensation: produce
4 the low delivery cigarette for tar, maintain a medium
5 delivery of nicotine. Seems like a smart idea.

6 Was it just our idea? No way. This was the
7 idea -- here's the Banbury report of a very important
8 conference that took place involving scientists both

9 outside and inside the industry, and here's one of
10 the most well known researchers in the area of
11 smoking behavior and what he said in 1980. It's
12 called "The case for medium-nicotine, low-tar,
13 low-carbon monoxide cigarettes." This was an idea
14 that came from the public health authorities and
15 outside scientists to skew -- to decouple nicotine
16 and tar and deliberately maintain nicotine levels,
17 deliberately maintain them while lowering tar. This
18 is what they proposed. They proposed.

19 Russell proposed it here: "Finally, a case will
20 be made for a medium-nicotine, low-tar, low-carbon
21 monoxide cigarette, or at least for some more
22 systematic research in this direction. This is based
23 on the premise, admittedly a little oversimplified,
24 that people smoke mainly for nicotine but die to a
25 large extent from tar and carbon monoxide." This is

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1 their idea, the public health idea. Not a bad idea.
2 Was it theirs alone?

3 Surgeon General, 1981. Surgeon General's report
4 says the same thing. "It should be determined
5 whether smoke from cigarettes" -- well, "The
6 tar-to-nicotine ratio may limit the delivery of smoke
7 constituents to the smoker. A low ratio might be
8 desirable strategy for low cigarettes." If we have
9 less tar, more nicotine, the lower ratio, that may be
10 more desirable from the point of view of lower-risk
11 cigarettes. Surgeon General himself was proposing
12 this line of research in 1981.

13 So you have the Surgeon General, 1981, dealing
14 with tar-to-nicotine ratios, much as Russell had done
15 in 1980. All in the open literature.

16 Did we respond with memos? Did we respond with
17 research? Absolutely we did, responsive to their
18 concerns and their issue. It was a smart idea.

19 What about pH and ammonia? That's a chart that
20 you're going to have a hard time dealing with for a
21 moment, but let's get into it for just a moment.
22 This is a theory that says that if you change the
23 chemical environment of nicotine, it may be more
24 readily available free base nicotine, and therefore
25 you could work with the same amount of nicotine, but

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1 because you're changing its chemistry a little bit,
2 people get it more quickly, it's absorbed more
3 quickly. So the idea is can we maintain the same
4 amount of nicotine but deliver it in a more readily
5 absorbed form by changing pH?

6 What's pH? PH is chemical environment. Over to
7 the left-hand side is acids, acidic; to the right-
8 hand side is basic or alkaline. Neutral is seven.
9 So when you think about it, grapefruits, citric acid,
10 that's over here; milk of magnesia is more basic,
11 that's over on the other side. Those are the kinds
12 of different kind of chemical environments.

13 Now if you have different chemical environments,

14 the form of nicotine changes. Over to the left-hand
15 side are nicotine salts. Over to the right-hand side
16 is free nicotine, basic nicotine, free base nicotine.
17 It's not meant to be just like, oh, this is hard
18 drugs nicotine, it's a form -- it's a statement of
19 chemistry. This is basic nicotine and it's got a
20 somewhat different chemistry to it.

21 As you increase the pH of smoke, as it becomes
22 more basic, at a certain point the amount of free
23 nicotine increases significantly, so in order to
24 figure out how much free nicotine is in any smoke,
25 you have to figure out what's the pH of the smoke.

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1 If the pH of the smoke is less than seven, there is
2 very, very little free nicotine. If it goes above
3 seven, free nicotine rises very significantly.

4 So now what was the idea that somebody had?
5 Again, let's make the pH higher, maybe by adding
6 ammonia, and thereby increase the amount of free
7 nicotine, making nicotine more available to smokers.
8 Who suggested this? Whose idea was this? National
9 Cancer Institute, looking for low risk cigarettes.
10 1976 article by Gio Gori talks about the possibility
11 of making that low delivery cigarette more
12 attractive, not by maintaining the amount of
13 nicotine, but changing its chemistry to increase pH.

14 And you'll see that down here he said this,
15 "Thus it appears that the hazards of cigarettes can
16 be reduced by a simultaneous reduction of tar and of
17 its specific carcinogenic activity -- read on -- "and
18 by an adjustment of nicotine levels," that would be
19 tar-and-nicotine ratio, "and protonation conducive to
20 consumer satiation." Protonation is another way of
21 talking about the effects of pH. So 1976 down here,
22 National Cancer Institute was saying the same thing.

23 If you take a look at the minutes, the meeting
24 minutes back during this same period of time, the
25 National Cancer Institute smoking and health

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1 program -- they had a whole program about it Mr.
2 Webber is going to describe. Now who was there? Gio
3 Gori, National Cancer Institute; also representatives
4 of the tobacco industry. And what kinds of proposals
5 are made? Purpose of the meeting, "It is necessary
6 to consider this additional approach to less
7 hazardous cigarettes, i.e., a low tar to nicotine
8 ratio." That's one of the things we talked about.
9 "Low tar cigarettes" is another. There's then a
10 whole discussion about nicotine nature and delivery
11 and you'll see that, "It was suggested that the form
12 of the nicotine could be critical in efficiency of
13 transfer and physiological impact which depends on
14 the base/salt nicotine ratio in the smoke aerosol."
15 Base/salt ratio, pH.

16 And as follow-up items, you can see the follow
17 up is again focused on the same thing, "Determine
18 nicotine, tar, pH and nicotine species distribution."

19 And then it goes on to say, "It may also be desirable
20 to attempt to increase or decrease the pH of the
21 mainstream smoke...." Again the National Cancer
22 Institute is the one that focused on this. Change
23 pH, enhance nicotine delivery, make low delivery tar
24 cigarettes more attractive.

25 There was just one problem: Taste. As you get
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1 to the right side and you increase free nicotine, you
2 change the taste of cigarettes. It was well
3 established in the literature at the time. This goes
4 back to 1929. This is published in the literature.
5 "The determination of free nicotine, as this volatile
6 part of nicotine has been designated, is of some
7 importance in the chemical examination of tobacco,
8 since the harsh flavor of certain tobaccos has been
9 attributed to a high proportion of this component."
10 So it's been published in the open literature, free
11 nicotine, and the fact that it produces a harsh
12 taste.

13 Studies that were done in 1953 say if you use
14 ammonia, guess what happens to taste? "The
15 artificial increase in the content of ammonia has the
16 sharpest effect in the above-described sense,
17 manifesting itself very strongly in raising the
18 sharpness of the taste sensations." So if you start
19 to push pH high, make it more basic, make it more
20 free base, you produce a harsh smoke. Will people
21 buy it or do they want those low delivery cigarettes?

22 Well now it's suggested to you that this was all
23 done, that ammonia was added. Ammonia was added to
24 Marlboro, and this was a document that was shown to
25 you yesterday, that described how -- I guess it was

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1 this page here -- Marlboro was increasing its pH over
2 Winston, and the key was the addition of ammonia.

3 Why was Marlboro adding ammonia and increasing
4 the pH? Mr. Ciresi suggested it was to increase the
5 delivery of free nicotine and that's the secret to
6 Marlboro's success. Remember that? Big sales, big
7 market share, adding that ammonia. There's just a
8 problem. If you take a look at the same document,
9 the same effect is attributed to Kool. Kool's pH is
10 increasing; it's above Salem, and Kool is gaining
11 market share against Salem.

12 There's just one problem. Back at the time this
13 memo was written there wasn't any ammonia that was
14 being added to Kools. Brown & Williamson makes
15 Kools. We didn't know -- we couldn't figure out what
16 the success of Marlboro was. We couldn't figure out
17 why it was that Marlboro was taking off in sales.
18 And we were not adding ammoniated reconstituted
19 tobacco to our products, including Kool, and yet Kool
20 was grabbing market share. Wasn't grabbing market
21 share by adding ammonia.

22 How do we explain that? How do we explain what
23 happened to Winston? Winston is this one right here.

24 And he says, well gee, Winston was losing market
25 share to Marlboro. But you don't see the last
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1 chapter, which is that they started to add ammoniated
2 tobaccos; that is, ammoniated process tobaccos to
3 Winston beginning in 1980 to compete with Marlboro.

4 What happened to Winston's market share?
5 (Whistling and gesturing a downward slope.) Just
6 like what happened to Kool's market share (gesturing
7 a downward slope). Adding ammonia is not the key
8 just by itself to market share. Marlboro was doing
9 something else. What was it doing?

10 My client, Brown & Williamson, has been trying
11 to figure that out for over 30 years because
12 Marlboro's been a huge success. And we got research
13 report after research report. We tried to reverse
14 engineer their tobacco to figure out why Marlboro
15 tastes so good. I got -- I got a very happy client
16 if we could figure out exactly what the recipe is and
17 why it works.

18 We think we have some ideas. We got to go back
19 to basics here. In the 1920s Camel cigarettes came
20 out and they were a new blend. They used what was
21 called bright tobacco and burley tobacco. They found
22 out that if you add these two things together you get
23 great taste. Lamina plus -- bright plus burley
24 spells great taste. Well guess what. Burley lamina
25 has got a lot of ammonia in it naturally. Bright has

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1 got a lot of sugars in it naturally. So we had the
2 bright idea maybe what's going on is that they're
3 adding ammonia but they're adding ammonia as part of
4 a bigger recipe with sugars, and enhancing those
5 natural ingredients produces great taste. So we
6 started to produce reconstituted tobacco in the
7 mid-1980s that was not just adding more ammonia, it
8 was adding a particular recipe that involved sugars,
9 and we thought tasted better.

10 What impact does that have on pH? Well if you
11 just add enough ammonia you'll increase pH. But
12 sugars tend to reduce pH. So if you look at the
13 recipe -- not just part of the recipe, the full
14 recipe -- you're not necessarily increasing pH. In
15 fact, adding our recon to our tobaccos with both the
16 ammonia and the sugar actually has the result of
17 reducing pH over what it would have been.

18 So not so simple, not just the pH, not just the
19 ammonia, tobacco blending, tobacco composition. You
20 got to look at the full recipe and you got to watch
21 out for taste.

22 What has happened with the pH over time? You'll
23 see outside reports where the pH's haven't jumped
24 over seven as people have been trying to produce free
25 base nicotine. The pH's have remained in the five

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1 and -- and lower six range by and large. Everybody
 2 is still basically around there. Very little free
 3 nicotine at that point.

4 The competition is not based on the free
 5 nicotine, it's not based upon boosting pH, it's based
 6 on taste. Everybody wants to get something that can
 7 compete with their competitors on the basis of taste.
 8 And that's what we've learned a lot as a result of
 9 the nicotine research process, is that smoking
 10 behavior is not just a question of nicotine
 11 titration. The nicotine titration as the theory we
 12 will show you has actually not been borne out by the
 13 science. The more recent science, the evidence will
 14 show, says that there are a whole variety of factors
 15 that contribute to smoking behavior: smell, taste,
 16 impact on sensory effects, ritual, social
 17 interaction.

18 Where do the companies compete? They compete
 19 for that great-tasting cigarette that people will
 20 like. And they do taste panel test after taste panel
 21 after taste panel test. What if we did this, will
 22 people like us better or worse? Let's give it to
 23 some smokers in a taste panel test and find out.

24 The industry is based on taste.

25 What has happened to nicotine over time? Would

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1 that there was some magical solution to cigarette
 2 design. Tar deliveries have fallen, nicotine
 3 deliveries, again according to the FTC method, have
 4 continued to fall. Nicotine is a matter of science,
 5 it's not a matter of emotion. Smoking behavior is a
 6 matter of science, it's not a matter of emotion.
 7 Competition is a matter of science, it's a matter of
 8 marketing, it's not a matter of emotion. And these
 9 companies compete tooth and nail for that market
 10 share based on taste.

11 Your Honor, I have about ten minutes and I know
 12 that I'm running into the lunch hour here. Whatever
 13 suits your pleasure.

14 THE COURT: You're starting to run out of
 15 time, counsel.

16 MR. BERNICK: Yeah, I understand.

17 THE COURT: Can you --

18 MR. BERNICK: Okay, I'll move -- I'll move
 19 it along quickly.

20 What about habit and addiction? This will move
 21 along quickly. You will see internal documents back
 22 in the '50s and early '60s talking about cigarette
 23 smoking as an addiction. You will see other ones
 24 that talk about habit. You'll see ones after the
 25 1960s that talk about dependence, others that talk

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1 about addiction.

2 What about all these labels? What do they all
 3 mean? Can't pursue this today in detail. Let me
 4 give you a flavor. The labels are all about

5 different kinds of definitions and different criteria
6 for smoking behavior, and the labels have changed.
7 Back before the 1964 Surgeon General's report, some
8 people said it was an addiction, other people said it
9 was a habit. We actually sponsored research during
10 this period of time, 1963, article by Knapp,
11 "Nicotine is the active agent, but not necessarily
12 the only noxious agent -- it appears to have certain
13 addictive qualities."

14 Summary and conclusions: "Heavy smokers appear
15 to be true addicts, showing not only social
16 habituation but mild physiological withdrawal
17 effects."

18 Who sponsored this research? Research was
19 supported in part by grants from the American Cancer
20 Society and the Tobacco Industry Research Committee.
21 We sponsored this research.

22 Addiction was a term that was used by scientists
23 in the literature. There wasn't an issue about
24 whether it could be published, in fact it was
25 published.

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1 In 1964, though, the Surgeon General came out
2 with a report, and the report specifically addressed
3 the issue of habit and addiction, and it concluded
4 drug addiction and drug habituation were two
5 different terms, and the tobacco habit was
6 characterized as an habituation rather than an
7 addiction. So you get the first Surgeon General's
8 report, 1964, says habit. Why? There were specific
9 criteria that the Surgeon General used to distinguish
10 hard drugs from tobacco. They're set out right here.

11 After 1964 the science in the outside world
12 changed. People started to use the term
13 "dependence." A different term, different criteria.
14 We picked up that term in some of our statements
15 internally. Others continued to say addiction. And
16 by the time the Surgeon General's report came out in
17 1988, the Surgeon General was saying cigarette
18 smoking is addictive based largely on the same
19 criteria that are criteria for dependence.

20 The plaintiffs' own expert in this case will say
21 addiction, dependence, use them interchangeably. So
22 we get evolving definitions based upon evolving
23 criteria. What counts? What is it that will change
24 the views or choices of a smoker? Well what about
25 quitting? Not the labels, not the definition, not

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1 the criteria, what about the common-sense notion once
2 you start it's hard to quit?

3 What happened during exactly this same period of
4 time? Well during exactly the same period of time
5 people quit, and the number of people who are former
6 smokers versus current smokers rose from
7 approximately 29 percent in 1965 up to 44 percent by
8 1987. Quitting became the thing to do.

9 And the Surgeon General's report, the very same

10 one that says cigarette smoking is an addiction,
11 announced that 41 million people had quit. But
12 here's the key: 90 percent of them without medical
13 assistance. Making choices, making real-world
14 decisions, what counts? Is it what label you use,
15 what criteria that you have, or is it the real-world
16 experience of can you quit and how to do it? Which
17 matters?

18 And what did we learn? We have learned that,
19 yes, it may be hard to quit. People do it, and
20 largely without the experience of the assistance of
21 doctors.

22 This whole area of research and area of
23 nicotine, we will show you, we commit to show you
24 that independent research was done, and that when you
25 finally apply the common-sense test, would anything

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1 have made a difference, something that we knew, we
2 will show you that the same basic practical wisdom
3 that has driven decisions for decades and longer, the
4 same practical wisdom is good today.

5 What about the defense of smoking? Did we
6 defend smoking? I only have a couple minutes. I'll
7 just give you a very brief overview. We defended
8 smoking. Smoking came under attack, the companies
9 came under attack. We had a trade association called
10 The Tobacco Institute. We had lawyers that defended
11 lawsuits over time, lots of lawyers, lots of
12 lawsuits. The companies and the industry wanted to
13 preserve their viability as an industry and wanted to
14 preserve the right of their customers to choose to
15 smoke or to choose to quit.

16 Did we take public positions on causation and
17 addiction? Yes, we did. The position on causation
18 was not that cigarettes don't cause disease, not that
19 cigarettes aren't risky, but that not -- there are
20 certain areas, I've shown them to you, where gaps
21 remain in our knowledge that you can't use that word
22 "causation" in absolute technical and scientific
23 sense. Does that mean that people should minimize
24 this? No. Does that mean that they should make
25 different positions about what to do with their

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1 lives? No. It's a statement about the state of
2 science, it's not a statement of public health
3 policy.

4 Did we say that cigarettes are not addictive but
5 habituating? The answer to that is yes. What were
6 we after? We still believe, like the Surgeon General
7 in 1964, that there's a difference between tobacco
8 smoking and hard drugs, that we feel that that
9 difference is captured by the difference of habit and
10 addiction.

11 Does that mean that it's always easy to quit?
12 No. Does it mean that nicotine is not an important
13 part of the smoking process? No.

14 Listen to our positions carefully. They were

15 carefully crafted. They mean a specific thing.
16 What impact did they have? The claim in this
17 case was that they have deceived, they have misled
18 people. Listen to the evidence, listen to the facts
19 and bring yourself into the world of dialogue and
20 discussion about cigarettes, and as you look at that
21 world and look at the positions that we took and
22 others took, ask yourself this question: Did we use
23 private facts for this discussion and our positions,
24 or were we relying on the same public facts that
25 everybody else has had made available to them through

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1 the offices of the scientific community and the
2 Surgeon General? Our position is that our views and
3 our conduct was driven by public facts that our
4 customers, that the states and others can appreciate,
5 just along with us. And then what was that
6 discussion all about? Was that a discussion that we
7 controlled, that we dominated such that we could
8 mislead people, or was that a discussion that
9 overwhelmed the tobacco industry, that overwhelmed
10 the debate because it was driven --

11 MR. CIRESI: Your Honor, I'm going to
12 object to the closing argument.

13 THE COURT: Counsel, you are really
14 starting to get a little too long.

15 MR. BERNICK: All right, I'll keep it to
16 the facts.

17 THE COURT: And keep it brief.

18 MR. BERNICK: And -- and keep it brief.

19 You will see the tobacco industry itself well
20 appreciated that no matter what it could have hoped
21 for, its public positions, dialogue and discussion
22 about tobacco was a public discussion. It could not
23 be and it was not dominated or controlled by the
24 industry because of all the different scientific
25 organizations, medical organizations, public health

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1 organizations and advocates who participated in that
2 process and got the same, indeed even more of the
3 attention of the media, the regulators and the
4 legislatures.

5 How do we reconcile what we said in our
6 positions with our responsibilities to our customers
7 to share information with them? We relied upon the
8 fact, and it will be a fact, that we're dealing with
9 a public discussion and public facts. We expected
10 our customers to do what everybody else in the public
11 did, which is to see what the public facts were, the
12 public decisions were and the debate, and to make
13 their own decision about what opinions to hold.

14 This issue is far too public to be dominated by
15 the tobacco industry. This issue is an issue where,
16 like the use of our product, it comes down to making
17 a choice based upon publicly available information.

18 Thank you.

19 THE COURT: We'll recess, reconvene at 2:00

20 o'clock.

21 THE CLERK: Court stands in recess.
22 (Recess taken.)
23
24
25

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1 AFTERNOON SESSION.

2 THE CLERK: All rise. Court is again in
3 session.

4 (Jury enters the courtroom.)

5 THE CLERK: Please be seated.

6 MR. WEBBER: Thank you, Your Honor.

7 Good afternoon, ladies and gentlemen. Even
8 before I get started, I -- I just want to take a
9 moment and thank you for the courtesy and attention
10 you've given to all counsel. My part is the last of
11 the opening statements for the four major cigarette
12 manufacturers, Philip Morris, Reynolds, Brown &
13 Williamson and Lorillard, so we are on the home
14 stretch, and I thank you for all the courtesy you've
15 shown us.

16 I'm pleased to be able to stand before you now
17 as counsel for the R. J. Reynolds Tobacco Company of
18 Winston-Salem, North Carolina. Winston and Salem
19 were two small towns years ago and they grew into
20 each other and it's now become a hyphenated city, and
21 it's no surprise, given its heritage, that two of the
22 company's leading brands are named after where they
23 came from, Winston and Salem.

24 I'm going to discuss two important areas of
25 evidence with you this afternoon. The reason we save

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1 these to last, quite frankly, is that they're best
2 understood in the context of all the information
3 you've heard up till now. The first area I'm going
4 to talk about relates to this chart right here, and
5 I've used a briefcase as a prop so I can get this up
6 a little higher so everybody can see it.

7 This is a chart that shows over time the
8 dropping levels of tar and nicotine on a sales
9 weighted average for American cigarettes, and the
10 first area I'm going to talk about relates to that
11 chart and what it is that R. J. Reynolds and these
12 other companies did to bring about these reductions,
13 reductions that the Surgeon General of the United
14 States has called drastic reductions. I'm going to
15 talk about how the cigarettes that are made by these
16 companies are the most responsive and advanced of any
17 cigarette companies in the world. I'm going to talk
18 about the evidence that will show you the hard work,
19 the investment and the innovation that went in to
20 achieving these results.

21 The other area I'm going to talk about is a
22 separate area. Mr. Bleakley spoke with you yesterday
23 about some of the flaws in the state's statistical
24 model. I'm going to talk about another area with

25 respect to the state's statistical model for just a
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1 few minutes at the end, and I'm going to go into the
2 calculations that underlie the statistical
3 projections that the state uses, and as I do that, I
4 think that evidence -- as I describe that evidence,
5 it will reveal why Mr. Ciresi yesterday said not one
6 word about how that 1.7 billion was calculated,
7 because I think the evidence will show you that the
8 calculations on which it is based are indefensible,
9 that they produce absurd projection results, and that
10 in the end you will find this sophisticated model --
11 I think was the language that was used -- to be
12 untrustworthy and unreliable.

13 An opening statement is an opportunity for a
14 lawyer to talk to you about what the evidence will
15 be. It's a commitment from the lawyer to the jury
16 about what the state of the evidence will be at the
17 end of the day when you retire to the jury room. I'm
18 looking forward to this opportunity. We will bear
19 this commitment out over the weeks and months ahead,
20 and I ask your patience and continued courtesy as you
21 listen to all the witnesses for all the parties.

22 I want to begin with the story of what it is and
23 how it is that R. J. Reynolds and these other
24 companies brought about these remarkable and drastic
25 reductions in tar and nicotine. Mr. Bernick, you'll

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1 remember, talked about tar-and-nicotine ratios and
2 some of the suggestions that science made about them.
3 I'm not going to address that issue, I'm going to
4 talk about what these companies did to reduce tar and
5 nicotine, and I want to start out with a reference,
6 first, to one of the claims made by the plaintiffs'
7 lawyer yesterday. He said, "In other words, the
8 defendants would do nothing to change their products
9 unless and until they were required to do so by
10 government, or as a result of being held accountable
11 in litigation." His words, not mine.

12 The evidence will show those statements to be
13 wholly unsupported by the evidence. The evidence
14 will show no support for that whatsoever. Indeed,
15 the evidence will tell a far different story -- some
16 of it may surprise you -- that the theories and
17 effects of cigarette design were discussed publicly
18 for years, that there was one whole Surgeon General's
19 report called "The Changing Cigarette" that discussed
20 cigarette design and the improvements these companies
21 had made, and that there were hundreds of pages in
22 other surgeon general's reports that discussed these
23 issues and hundreds of articles in the press.

24 RJR and these other companies were working on
25 changing cigarettes from the 1950s on, reducing

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1 deliveries with developments such as the filter,
2 porous paper, expanded tobacco, reconstituted
3 tobacco, and I'm going to explain some of that for
4 all of us as we go along. These developments were no
5 secret. There was public discussion and debate year
6 in and year out.

7 You'll also learn that these companies made
8 numerous and substantial contributions to the science
9 of understanding tobacco and smoke, contributions
10 published in the literature, attendance at the
11 Tobacco Chemists Research Conference year in, year
12 out, conferences where government officials, public
13 health officials came and joined in with tobacco
14 researchers and exchanged ideas about designs and
15 chemistry. You're also going to learn a good deal
16 about a cooperative 12-year venture, and I emphasize
17 "cooperative," 12-year venture between these
18 companies and the National Cancer Institute along
19 with independent researchers and members of other
20 companies. This was called The National Cancer
21 Institute's Less Hazardous Cigarette Project, and for
22 12 years these companies worked with the National
23 Cancer Institute on that project. You'll learn that
24 in 1968, toward the beginning of this exercise,
25 representatives of these companies went to Washington

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1 and met with the Secretary of Health and
2 Education -- I think it's Health and Human Services
3 now. Back then it was secretary Wilbur Cohen, one of
4 the country's great labor leaders. He was a member
5 of the cabinet, and they met with him about working
6 on the less hazardous cigarette project. And among
7 other things as they talked about that project with
8 the secretary, they told him that if they ever got to
9 the point where someone invented a cigarette that the
10 government accepted as truly safer, truly ground-
11 breaking, solving all the problems, that no one
12 company would try to exploit that but they would work
13 out arrangements to make sure that no economic
14 advantage came from it and that the companies could
15 share that technology, and they shared that concept
16 with the government in 1968.

17 You're going to learn that this cooperative
18 effort at the National Cancer Institute went on for
19 12 years, theorizing about how to design cigarettes,
20 testing cigarettes, bringing people from different
21 areas of the science that had been following this
22 together. You're going to learn these companies
23 cooperated for 12 long years, and the evidence will
24 show you that in 1978 that project ended because the
25 federal government shut it down. There was a new

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1 secretary in the department and he changed the
2 federal policy, said the federal policy should not be
3 the work of the companies' less hazardous cigarette
4 projects any more, and after 12 years of cooperation,
5 that ended by federal policy.

6 But the companies continued working, studying,
7 searching, researching, looking for new technology,
8 taking actions that would count, actions approved by
9 their highest executives, actions backed by hundreds
10 of millions of dollars of investment to bring about
11 the types of results you see before you. And when
12 the evidence begins in this case tomorrow, I think
13 one question is fair to keep in your mind, because if
14 there was a conspiracy, if these companies wouldn't
15 do anything unless the government forced them to, if
16 that's true, if there were a conspiracy, why is it
17 that the types of innovations that brought about
18 these drops all came from these companies, no one
19 else in the world? Hundreds of tobacco companies
20 worldwide, governments worldwide, our government, yet
21 these developments came from these companies working
22 in a competitive marketplace.

23 It's also fair to ask why Mr. Ciresi would say
24 these companies did nothing unless they were forced
25 to. And keep this in mind as we go through this

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1 evidence and see whether these were because the
2 government forced these companies to do it or whether
3 it was because of their reaction to changing
4 marketplace and competitive activity.

5 When all the evidence is in front of you on
6 this, it will demonstrate, ladies and gentlemen, that
7 there is no one, no company anywhere in the world
8 that can demonstrate it has made cigarettes more
9 responsive to the public health community or they can
10 be proven to be safer and still smoked by consumers
11 than what these companies have done in the American
12 marketplace.

13 Now I'm sure you're wondering how it is this got
14 accomplished. How did Reynolds decide which ideas to
15 follow, which theories made sense on design, what
16 should they invest in, what should get top priority?
17 How did these drastic drops come about? Well you're
18 going to hear evidence from a number of people. I'm
19 going to refer a little bit to Dr. David Townsend,
20 who's a Ph.D. cigarette designer at R. J. Reynolds
21 who's been there for years. Dr. Townsend will come
22 here and testify and explain to you what R. J.
23 Reynolds did, how it listened to the suggestions from
24 the Surgeon General and the public health community
25 in changing cigarettes, and what Dr. Townsend is

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1 going to start out with is he will explain the way
2 this works by going through the product design
3 process. This is a process that doesn't apply only
4 to cigarettes, it basically applies to design in
5 anything, a house, an office building, a car. These
6 are the types of factors designers have to take into
7 account in making their decisions. And in this case,
8 cigarettes, that first one, defining the design goal,
9 was a major challenge. And the reason it was a major
10 challenge is manifold and I want to mention a number

11 of those reasons right now.

12 First of all, Mr. Bernick mentioned, and Mr.
13 Ciresi mentioned as well, a number of different tests
14 that have been used on cigarettes. We've heard about
15 mouse skin-painting, heard about other biological
16 tests, Ames tests, DNA testing. There are literally
17 dozens of tests that have been used to compare
18 cigarettes against each other. One of the problems
19 was the government never said, the state of Minnesota
20 never said, no state ever said that any one test was
21 the one to design the goal toward. And that's an
22 important piece of evidence because you will hear
23 that different of these tests give different results.
24 Some tests with the condensate from smoke on one kind
25 of cigarettes will show that there's biological

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1 activity, that an animal or a cell reacts to it, and
2 yet another one of these tests, same substance, no
3 reaction. So it's not -- not a black and white
4 issue. There are many different tests, many
5 decisions to be made.

6 Let me just give you one example that I know
7 that the witnesses will talk about. Many products we
8 have, we do know what the standards are. Governments
9 do announce them. Take cars, for example. Standards
10 on just how the brakes should perform or just what
11 the crashworthiness should be or how stiff the sides
12 should be without losing integrity to the front and
13 the back. But it wasn't that way in this case for
14 cigarettes. It never was. And this created very
15 real practical difficulties. But the evidence will
16 show you that over time one test came to be focused
17 on, and this is a test that came out of the Federal
18 Trade Commission. You've heard a number of
19 references to it over the past few days, the Federal
20 Trade Commission test for measuring tar and nicotine.

21 Now no one says that the tars produced in that
22 test precisely mimic the way humans smoke under all
23 conditions at all times. They don't. FTC knows
24 that, public health community knows that, the
25 companies know that. These are -- these test results

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1 come from having a machine smoke cigarettes. But
2 what it does is it does give a real basis for
3 comparing one cigarette to another, and I'm sure even
4 if you're not a smoker and never have been, you know
5 about those FTC numbers. You've heard about them,
6 the tar and nicotine ratings. You see them on every
7 ad since 1972. And you will learn from the evidence
8 here that these differences are real differences.
9 They are bases to compare cigarettes and these
10 differences have meaning.

11 For this reason, that federally required test
12 has become a focus of cigarette design efforts, and
13 here's a quote from the 1979 Surgeon General's
14 report. "As long as warnings of health hazards from
15 smoking are disregarded and as long as cigarettes are

16 consumed, efforts towards a reduction of tar and
17 smoke components which may contribute to these health
18 hazards should be continued." And that was the work
19 these companies were about, reducing, reducing tar
20 and nicotine deliveries.

21 Evidence will show you the companies put aside
22 whatever doubts they had for this purpose, about
23 whether those mouse skin-painting experiments with
24 tar really were what some people said they were.

25 There were always questions about the significance of

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1 those results and about whether tar could be used to
2 measure smoke because tar isn't smoke. But they put
3 those aside and they worked to reduce tar and
4 nicotine deliveries. And they also, you will hear
5 evidence -- very important -- not only did they work
6 to reduce tar and nicotine deliveries cigarette to
7 cigarette, but they worked to reduce the biological
8 activity of tar on an equal weight basis, if you
9 understand me. That is, one cigarette may produce
10 more tar than another, but if you got the equal
11 amount from each and then you test those in a
12 biological system, they worked to try to reduce
13 biological activity on an equal weight basis.

14 Now how will the evidence demonstrate that these
15 comparisons have meaning, by that I mean that lower
16 tar cigarettes were in fact the way to go, that they
17 listened and they listened for the right reasons?
18 Here's a quote from Dr. Wynder himself. He was the
19 one who did those mouse skin experiments. Because of
20 the problems with our system today, I know it's hard
21 to read, but what he says in the top
22 paragraph -- this is shortly after his mouse skin
23 experiments, he says, "A filter tip capable of
24 filtering out 40 percent of the tar would be a step
25 in the right direction." Then he goes on to talk

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1 about that and he says at the end, "A reduction to
2 that level, as shown both by animal experiments and
3 human statistical studies, would be a significant
4 reduction in cancer risk." And these companies, as
5 this chart shows you, have not only made that 40
6 percent reduction, but another 40 percent and more.

7 So I want to turn now to the second phase of
8 that design process and go through that and the
9 others with you as quickly as I can. You have to
10 assess also, if you're designing, the effect of every
11 choice you make on the rest of the design, and by
12 that I mean if you're in San Francisco and you want
13 to design a very tall building, you don't build it
14 with the strongest, most inflexible steel, because if
15 the earth starts to shake, then your design isn't
16 very good. And the point here is that any part of
17 the way you design a product can affect other parts,
18 and it's true in cigarettes, too. Changing one part
19 of the cigarette might change the temperature at
20 which it burns, which might change the burn rate,

21 which may change the different chemicals that are
22 formed. It is a complex process and Dr. Townsend and
23 others will come here and describe it to you.

24 Take for example, you know, if your goal in
25 designing a car was to make a car in which nobody

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1 inside would get hurt in a wreck, you could do it,
2 they could do it today, and would make a car ending
3 up looking like a Sherman tank. Couldn't go very
4 fast, wouldn't dent, wouldn't roll over, et cetera.
5 But it wouldn't work in the marketplace because the
6 choice that is necessary to reach your design goal in
7 fact gave you a product that no would want and nobody
8 could afford.

9 And that gets us to the third part I'm talking
10 about, very important in cigarettes as well, consumer
11 acceptance, commercial feasibility. You may make the
12 best product in the world, you may have fit your
13 design goals exactly, you may have assessed the
14 effect of everything, but if people don't buy it,
15 your design is a failure. It's true and we all know
16 that in our own marketplace experience, and it's also
17 true in cigarettes in a particularly important way.

18 I want to refer again to some advice Dr. Wynder
19 gave years ago on this very subject. I know this is
20 a long quote, but it's an important one, and I'd ask
21 you to follow with me on one of the screens, if you
22 can. "As a practical matter, it's important to
23 appreciate that a virtually harmless cigarette smoked
24 by only one percent of the population will have a
25 lesser impact on the reduction of tobacco-related

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1 diseases than a somewhat more harmful cigarette
2 smoked by 80 percent of the population. Research on
3 the less harmful cigarette should therefore be
4 directed toward developing a cigarette containing the
5 lowest possible amount of harmful elements for all
6 tobacco-related diseases, but one that has sufficient
7 acceptability for the largest segment of smokers."

8 The point Dr. Wynder, who did those initial
9 experiments, made there is it doesn't matter how good
10 your design is, if people won't use it, it's not a
11 success in the marketplace.

12 We'll also hear about the differences between a
13 good idea, a good design, something consumers might
14 even like, and the difficulty in getting that made
15 into the marketplace. That's that issue of technical
16 and manufacturing feasibility. There will be
17 evidence here on that. You will learn that some of
18 these cigarette design developments were made
19 available only because of technological developments
20 in other areas over the past 20 years. You will
21 learn that to make some of these cigarettes, hundreds
22 of millions of dollars had to be invested in
23 equipment that had never been made before. Technical
24 feasibility, another one of the issues a designer has
25 to concern himself with.

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1 Last but not least, regulatory feasibility.
2 Even if the design is great, even if people want it,
3 even if you can make it, doesn't do you any good if
4 the government doesn't let you sell it or let you
5 talk to people about it. And cigarettes are
6 regulated. States and the federal government make
7 decisions on what can be sold, and they also make
8 decisions on what can be said about these products.
9 And you'll hear about that as well.

10 So how then did these companies go about
11 bringing about the reductions that the Surgeon
12 General says are drastic? How did they do it? I
13 want to discuss that evidence now. There were two
14 major sources considered, general reduction,
15 selective reduction. General reduction is a process
16 by which everything that comes out of a cigarette is
17 reduced, and the best example I can give you on that
18 is a filter, that generally most everything coming
19 through the filter would be reduced. Selective
20 reduction is a much more complicated, expensive and
21 time-consuming task.

22 Selective reduction was a theory that said see
23 if you can do something to cigarettes to snatch out
24 almost, snatch out of the smoke just certain
25 chemicals, certain ones that science was then

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1 concerned with, certain chemicals that may have
2 existed only at the level of nanograms, one billionth
3 of a gram. And just -- a gram is about the size of a
4 little Equal sugar packet or artificial sweetener
5 packet. You know what I mean? A billionth of a
6 gram. If you took a billion pieces of paper, it
7 would be a stack 63 miles high. If you could hold
8 the stack in order and turn it over, it would get you
9 from this courthouse a little bit past Menomonie,
10 Wisconsin. So a billionth is a real small amount of
11 a gram. And to work with those infinitesimally small
12 quantities took advances in analytical chemistry,
13 took some very sophisticated equipment and some very
14 sophisticated understanding.

15 There were efforts made to reduce benzpyrene.
16 There's been some discussions of that chemical.
17 Polycyclic aromatic hydrocarbons, benzpyrene.
18 Enormous money invested into trying to just pick
19 those nanogram quality -- or nanogram quantity
20 chemicals out of the smoke. There were different
21 theories. Try to change the way smoke burns so that
22 benzpyrene isn't formed. Try to get a filter that
23 would pick out benzpyrene. Try to -- try to add
24 materials to a tobacco so that the whole burning
25 combustion is different and whatever benzpyrene is

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1 made is destroyed before the smoker gets it. All

2 sorts of ideas like this. And as they were working
3 this through, Dr. Wynder himself said in 1957 that
4 his experiments have confirmed that the amount of
5 benzpyrene in smoke was so small that it couldn't
6 account for the reaction in his mouse skin
7 experiments.

8 There was also concern about chemicals called
9 phenol that people wanted out of smoke, and there
10 were great efforts to selectively get them out, and
11 then some other research came out and said, well, it
12 may be that phenol actually stops the effect of
13 benzpyrene. Should you take phenol out then?

14 Dr. Wynder suggested at one time that one way to
15 reduce benzpyrene was to use tobaccos high in
16 nitrate., that that would reduce benzpyrene. Few
17 years later they said never use tobaccos high in
18 nitrate. So this selective process was one where
19 priorities were changing over time, different
20 priorities being put on different chemicals.

21 There are the quotes. One says go to high
22 nitrate in '67, another to low nitrate or don't do
23 that in '84. So these priorities were changing over
24 time in terms of what the emphasis was.

25 But the companies didn't stop trying to reduce

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1 these chemicals. They worked. They just moved
2 primarily to a little different method. Here, for
3 example, shows you the results from 1956 to 1992
4 regarding average amount of benzpyrene in a Winston
5 cigarette. Fifty-two nanograms down to ten nanograms
6 over that period. So while selective reduction ended
7 up not being the way most of the work was done
8 because of its complications, you can see that these
9 deliveries have been reduced through other
10 techniques.

11 I'd like to turn now to speak about that other
12 technique, general reduction. And there were
13 advantages to it. Dr. Townsend will come and explain
14 those to you. They're much more technically
15 practical than selective reduction. It addressed all
16 potential target compounds, or at least could in
17 theory, not just one. It avoided unintended
18 consequences. That's an important fact because one
19 of the methods that -- that one company came up with
20 to reduce benzpyrene, and this was the Liggett
21 company, they came up with this, was that they added
22 palladium and a cobalt-based heavy metal to a
23 cigarette, and that did prevent the benzpyrene from
24 forming, but it had possibly unintended consequences:
25 They had heavy metals they were putting in there.

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1 Now they never marketed the cigarette, it was a -- it
2 was an experiment done, but it just shows you how --
3 how careful -- how one part of this affects another.
4 You have to avoid unintended consequences, and
5 general reduction does that. It also hits the point
6 that Mr. Bernick mentioned before, maintains the

7 character of the taste. It still tastes like a
8 cigarette to the people smoking it.
9 Now I want to discuss some of those general
10 reduction methods with you now and I want to
11 emphasize that each of these -- I think they're a
12 little more clearly observable on the side screens,
13 and I'm sorry for the problem with our equipment -- I
14 want to emphasize that each of these is a development
15 brought about by these companies here in the United
16 States working in this competitive marketplace.

17 Bear with me a minute, I want to get something
18 out.

19 Let me start out with reference to some of the
20 easy ones, filtration. You will hear that there were
21 thousands of filters tried, just thousands of
22 different ones, and that the cellulose acetate filter
23 is one of the major advancements that has reduced tar
24 and nicotine. Porous paper is an interesting one in
25 which microscopically small holes are put with lasers

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1 in the cigarette paper. And what does that do? It
2 let's some gases escape. It also lets some air come
3 in. And it's an interesting phenomenon that air,
4 because it has a higher pH than -- than cigarettes
5 do, than smoke does, with porous paper the pH will go
6 up because you're drawing in some room atmospheric
7 air. But it does allow gases to escape.

8 Reduced circumference. Reducing the size a
9 little bit can reduce the amount of tobacco. Reduce
10 the amount of tobacco a little bit, you lower tar and
11 nicotine.

12 Expanded tobacco is a process invented by R. J.
13 Reynolds, and I want to -- rather than describe it, I
14 think the best thing to do is show it to you. These
15 two jars hold the same amount of tobacco. This is
16 regular tobacco, not expanded, this is expanded
17 tobacco. And it's a process best described by saying
18 it's almost like popping popcorn. Same amount. You
19 subject it to a process. There are different ways to
20 do it -- freezing, heating, carbon dioxide -- but it
21 comes out like this, and the net result is you can
22 put some of this in a cigarette and blend it with
23 regular tobacco. Net result, less tobacco in the
24 cigarette, less tar, less nicotine. And there are
25 also some other results that I'm going to mention

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1 based on the National Cancer Institute testing as
2 well.

3 Faster-burning paper, another development.
4 Filter ventilation, another development of the type
5 I've talked about.

6 I want to move on now to reconstituted tobacco,
7 another development that I'm pleased to say was
8 invented by the R. J. Reynolds Tobacco Company. It
9 was a key development in reducing tar and nicotine.

10 If you come to this chart, see 1957,
11 reconstituted tobacco. Now no cigarettes are made

12 commercially that are solely reconstituted tobacco,
13 they all have some -- not all, but many have some
14 reconstituted tobacco in the blend. And what
15 reconstituted tobacco is is this. When a cigarette
16 is made, the leaf, the lamina, is stripped from the
17 stems in the leaf, and the stems used to be
18 discarded. Well Reynolds developed a process whereby
19 certain of the stems were re-collected, chopped up,
20 mixed in a water slurry, and they were mixed also
21 with what are called tobacco fines, f-i-n-e-s,
22 tobacco dust that is made in the rest of the process.
23 Here is some stems. Here are some fines. And the
24 reconstituted sheet process took these together,
25 chopped them up, put water in with them, then

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1 dissolved everything that water would dissolve, took
2 that mix out, and it had a solid, made those solids
3 into sheets and later in the process would put the
4 tobacco solubles that had been removed, they'd put
5 them back in. And what you'd end up with is what's
6 called reconstituted sheet. If I can get this out
7 here, I'll show you. It's almost like a paper-making
8 process. All tobacco, but made from those pieces I
9 showed you.

10 Then what they do is they chop this up, small
11 pieces, and blend it into a cigarette. Reconstituted
12 tobacco sheet, you will -- you will learn, is another
13 reason tar and nicotine is lower. There is less tar
14 and nicotine in the stems, and by using these you've
15 reduced tar and nicotine by mixing reconstituted
16 sheet into your blend.

17 Reconstituted sheet does taste harsh, doesn't
18 have full tobacco flavor, and oftentimes but not
19 always there will be some ammonia treatment to
20 edge -- take the edge off the harshness as that is
21 mixed in, and you'll hear the evidence about that as
22 well.

23 Let me go back and just refer generally now to
24 these -- these processes that have brought about this
25 drastic reduction. These weren't secret from the

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1 Surgeon General or the public health community, they
2 were discussed in public meetings and conferences,
3 public patents, discussed at great length in surgeon
4 general's reports, as I've mentioned before.

5 It's also important to note that cigarettes with
6 these modifications were tested by the National
7 Cancer Institute in a 12-year cooperative program
8 before the federal government shut it down due to a
9 policy change. What they did in this program was
10 they took cigarettes made by these companies with
11 these modifications and they tested them against
12 certain standard or reference cigarettes that didn't
13 have the modifications, and the tests the government
14 chose, the National Cancer Institute, was the mouse
15 skin-painting test we've heard a lot about where you
16 collected this tar, which really isn't smoke, it's --

17 it's -- it's an artificial substance, but you collect
18 it, paint it on the back of the mice and see what
19 kind of biological reaction you get. And the -- and
20 they did this in a way so that you could compare one
21 cigarette to another. They did it on a gram-per-gram
22 basis, and I want to be clear about that because it's
23 so important here. They took two grams or whatever
24 of tar from the experimental cigarettes and tested it
25 in mice against two grams of tar from the standard

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1 cigarette without the changes. And the National
2 Cancer Institute results are clear. Cigarettes made
3 with reconstituted tobacco sheet had less biological
4 activity than the reference cigarette. Cigarettes
5 made with tobacco stems had reduced biological
6 activity from the reference cigarette. Cigarettes
7 made with the air dilution filter had reduced
8 biological activity. Cigarettes made with porous
9 paper, reduced biologic activity. Cigarettes made
10 with expanded tobacco, reduced biologic activity.
11 All in the mouse skin tests as performed by the
12 National Cancer Institute.

13 But there's even more that R. J. Reynolds and
14 these other companies did. They didn't stop at just
15 general and selective reduction, they tried some
16 ideas that I think are going to even surprise you
17 more. One thing they tried was tobacco substitutes.
18 The theory here was to find something that burned a
19 little different than tobacco, something that would
20 burn and maybe not produce as many chemicals, and if
21 you could find that, then see if you could chop it up
22 and blend it in a cigarette. Theory: a less
23 complicated smoke, a more simple smoke, less
24 chemicals.

25 I hope you can see some of the things they

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1 tried. Reynolds tested over a hundred substitutes,
2 including 33 ideas that outsiders brought to Reynolds
3 thinking they made the invention of the century.
4 They investigated plant leaves, puffed grains,
5 vegetables, vegetable hulls, shucks, skins,
6 practically everything but bamboo was tested here.
7 They tested all these different things, and
8 eventually the substitute theory didn't work out, and
9 the reason the substitute theory didn't work out was
10 there was so much progress being made on general
11 reduction that that method was focused on. Some of
12 the substitutes would have produced different
13 chemicals when they were burned, and that was a
14 problem, and by that I mean different chemicals than
15 what was already in smoke. And thirdly, some
16 substitute cigarettes had been tried in Europe and
17 had never been commercially successful.

18 But again, the story isn't over. I want to talk
19 about two alternative technology cigarettes,
20 cigarettes based on recommendations from the public
21 health community. And the first one I want to talk

22 about is Philip Morris's NEXT cigarette, put out in
23 the early '90s, a denicotined cigarette using
24 technology that -- that is analogous to how you
25 decaffeinate coffee. They essentially denicotined
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1 their cigarette and they advertised it and they spent
2 a lot of money on it. And based on what you heard in
3 this case up till now you probably would think that
4 the federal government and the state of Minnesota
5 were there applauding this development. But they
6 weren't. The federal government harshly criticized
7 this and said it was a hazardous cigarette, and NEXT
8 became a footnote in cigarette design history, a
9 failed product.

10 An even greater failure -- and I have to admit
11 it was my client's cigarette -- Premier. I don't
12 know if you heard about it. It even had a movie
13 that -- that made jokes about it. Premier came at
14 design from another angle than NEXT. Premier was
15 remarkable in that it produced no traditional tar,
16 and that was because it heated tobacco but didn't
17 burn it. In a Premier there's a little tip of carbon
18 at the end, it's lit, and then as the air is drawn
19 in, it's heated by the carbon, goes over the tobacco
20 and the extracts and volatilizes or releases flavors,
21 nicotine and other tobacco flavors. Essentially a
22 no-tar cigarette. Years, hundreds of millions of
23 dollars. Again I think you might assume that the
24 government would say no-tar cigarette, low nicotine,
25 this is what we've been recommending, but you'd be

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1 surprised because the government didn't react that
2 way. And I'll tell you about that in just a moment.
3 When Premier was marketed -- well let me strike
4 that. Before it was marketed, because its technology
5 was so different, Reynolds subjected Premier to a
6 battery of tests and published the results in a
7 700-some page monograph and submitted these results
8 to a blue ribbon peer review committee with key
9 reviewers from Duke, Kansas, Texas, Michigan State,
10 MIT, University of Rochester, Johns Hopkins, on and
11 on, and gave it to them, and they agreed that the
12 science was good.

13 Reaction in other parts of the world wasn't the
14 same. Some experts from the Federal Ministry of
15 Health in Berlin considered this research monograph
16 possibly Nobel prize worthy for the work that had
17 been done. You heard earlier someone mention the
18 journal Lancet. Lancet is a British journal. It is
19 either the number one or number two medical journal
20 in the world. And what did The Lancet have to say
21 about this?

22 Could we make that just a little bit bigger?
23 There you go.

24 It talks hear about Premier. "The smoke was
25 virtually tar free, water and glycerol. Nicotine was

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1 low." That last two sentences -- or the last
2 sentence, "In terms of the aims for product
3 modification laid down by the U.K.," United Kingdom,
4 the British, "independent Scientific Committee on
5 Smoking and Health, this would seem a
6 near-perfect low tar cigarette and there is no doubt
7 that it would be less harmful than most other brands
8 on the market." The Lancet. Near-perfect low tar
9 cigarette. And you will notice they're talking there
10 about standards for product modification laid down by
11 the independent committee in Britain formed by the
12 government. We don't have any such committee here.

13 Is that the same reaction here? Did the state
14 of Minnesota say no tar cigarette, virtually perfect?
15 Well you might be surprised.

16 Dr. Koop, then Surgeon General, said the product
17 shouldn't be marketed. The second quote is from the
18 Commissioner of Health for this state who petitioned
19 the FDA to keep this product off the shelves. The
20 last one is from the president of the Minnesota
21 Public Health Association, also to keep this product
22 off the shelves. All this despite the fact that for
23 smokers it was virtually tar free.

24 Now the evidence on Premier and NEXT I think
25 will be of particular significance because it speaks

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1 to this regulatory feasibility and the consumer
2 acceptance tests I've been talking about, and what it
3 says about regulatory feasibility is interesting.
4 Philip Morris comes out with a cigarette, no
5 nicotine, and it's criticized by the federal
6 government. It had tar but no nicotine. Reynolds
7 comes out with a cigarette, has no tar but has low
8 nicotine, and that's criticized. Over a billion
9 dollars spent between these companies on investing in
10 those technologies. In addition, they were both
11 failures in the marketplace. There was great
12 controversy about them. NEXT was a failure and so
13 was Premier.

14 Premier's failure even tells you some more.
15 What Premier's failure demonstrates is the flaws in
16 the plaintiffs' theory about nicotine that you've
17 heard earlier. If smokers really did only smoke for
18 nicotine and not for a balanced taste in a cigarette,
19 Premier would have been an extraordinary success
20 because it did alter the tar/nicotine ratio,
21 virtually no tar, low nicotine, but it didn't succeed
22 any more than some of the other cigarettes the
23 Surgeon General talked about years ago, cigarettes
24 that were made out of lettuce for experimental
25 purposes and then laced with nicotine. Smokers

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1 wouldn't smoke those either because of taste. And in
2 the end that's why they didn't smoke NEXT and that's

3 why they didn't smoke Premier.

4 The evidence will show that, to the credit of
5 these companies, they haven't stopped there. My
6 client, R. J. Reynolds, is now marketing in a test
7 market in the United States and in a number of
8 foreign countries a cigarette called Eclipse.
9 Eclipse is based on the same basic technology as
10 Premier except, to improve the taste, a very small
11 amount of tobacco was burned. And like Premier,
12 almost all the secondhand smoke is eliminated. Like
13 Premier, the fundamental composition of smoke is
14 simplified. Like Premier, it dramatically reduces
15 and in some cases eliminates the suspect chemicals.
16 And it's low nicotine, less than 85 -- lower than
17 that of 85 percent of the market. So they're trying
18 with Eclipse now. It's being sold in Scandinavia, a
19 number of countries in Scandinavia, in Germany and
20 Japan and being tested in several U.S. markets, and
21 we'll have to see what the U.S. consumers say about
22 it.

23 Philip Morris just announced a different product
24 called Accord, a product that, again, is a low smoke,
25 low delivery product.

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1 This ending point on this part of my discussion
2 with Eclipse and with Accord, Premier and with NEXT,
3 brings me to where I want to just sum up on this and
4 move on to my second piece. Mr. Ciresi told you
5 yesterday, his words, "Defendants would do nothing to
6 change their products unless and until they were
7 required to do so by government, or as a result of
8 being held accountable in litigation." That's not
9 what this evidence is going to show. This evidence
10 is going to show a history of dedicated work by men
11 and women of science who dedicated their careers to
12 bringing about these kinds of results,
13 investing -- by a history of companies and their
14 chief executives authorizing the investment of
15 hundreds of millions of dollars to bring about these
16 results and try to go one better. Companies that
17 were criticized for making a no nicotine cigarette
18 and criticized for making a no tar cigarette.
19 Companies that have been searching for technology to
20 reduce delivery but still make products that smokers
21 would like and that the government would let them
22 sell.

23 Let me move now to a second piece, the other
24 area I said I'd speak with you about. Try not to
25 knock any of my stuff over. The second part I wanted

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1 to talk to you about, it requires us all to do a
2 little bit of a jump because it's an unrelated topic,
3 and this deals with the point I made to you earlier
4 that the calculations underlying the plaintiffs'
5 statistical model, the calculations that were not
6 mentioned by Mr. Ciresi, are inherently
7 untrustworthy, unreliable and unacceptable as a

8 matter of science. Now those are strong statements.
9 But I tell you that Dr. McCall, professor of
10 economics here at the U of M, is going to take that
11 stand and tell you that. He's going to tell you that
12 if a student brought this to him, they could not pass
13 at the University of Minnesota. Dr. Wecker is going
14 to come and talk about this as well, he's a professor
15 at Stanford, formerly a professor at the University
16 of Chicago in statistics, now has a consulting firm.
17 He'll take that stand and say the exact same thing,
18 his students at the University of Chicago wouldn't
19 have got a degree for this. And I'm going to explain
20 why.

21 I want to start out with the oldest group, want
22 to start out with claims for 94-year-old women in
23 nursing homes. This is part of the plaintiffs'
24 proof, not ours. They claim for 94 year-olds in
25 nursing homes 87 million dollars that they say my

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1 client and these other clients owe them, and they say
2 that because in the national survey they used there
3 were three 94-year-olds in nursing homes, two of them
4 were smokers, one wasn't, and they looked to see who
5 stayed in the hospital longer, said the smokers -- or
6 the nursing home longer. It was the smokers. So
7 they did a statistical projection and shazam, 87
8 million dollars.

9 Well the defense experts looked at that national
10 data and went behind just the data and looked at what
11 was included for who these 94-year-old women were,
12 and because that's such a busy chart, I wanted to
13 make sure you could see this. This is what --

14 Is that okay for everybody on the angle?

15 There were two 94-year-old women in this
16 survey --

17 THE COURT: Counsel.

18 MR. WEBBER: I'm sorry.

19 THE COURT: I think if you're going to be
20 showing charts, I think the court would be interested
21 also.

22 MR. WEBBER: I'm sorry. It's --

23 THE COURT: If you can move it around so
24 everybody can see it.

25 MR. WEBBER: Judge, is that -- Your Honor,
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1 is that okay?

2 THE COURT: That's fine, but then you can
3 turn it to the jury. Just so I see what you're
4 showing.

5 MR. WEBBER: Okay.

6 THE COURT: Okay.

7 MR. WEBBER: These are the women who
8 produced through statistical projection 87 million
9 dollars in expenses that they claim from my client
10 because they stayed longer in a nursing home, their
11 model says, because they were smokers. Well let's
12 look. Jane Doe number one started smoking at age 30,

13 smoked to age 38 and smoked four cigarettes a day.
14 She entered the nursing home at age 93, 40 some years
15 after she quit smoking. And when she entered, what
16 were her conditions? The poor woman was depressed,
17 she was paranoid, she had a mental disorder. Her
18 husband had passed away. She had a history of mental
19 problems and a history of nervous breakdown. This is
20 the smoking expense in their sophisticated model.

21 Jane Doe number two is even worse. Jane Doe
22 number two, interestingly, started smoking at the age
23 of 80, smoked one cigarette a day till she was 87,
24 entered the nursing home at 87. When she entered, it
25 was because she was coming after hospitalization for

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1 a fall. This poor woman, too, had a whole series
2 of sad types of things that happen to you when you're
3 94: anxiety, psychosis, convulsions, et cetera. But
4 these two women, based on their statistical
5 projection, because they were smokers, 87 million
6 dollars is what they're claiming, and their own
7 witnesses will admit that on cross-examination.

8 Thank you, Ann.

9 Now that's what the evidence says about the
10 oldest. Let's see what the evidence says about the
11 youngest group. This deals with a group of 19- to
12 34-year-old men, and this too is a busy chart and
13 I'll explain it -- I know it's a little hard to get
14 through -- 19- to 34-year-old men who plaintiffs'
15 experts admit don't get diseases related to smoking
16 like lung cancer or heart disease, the other things
17 they say are related to smoking. Their experts admit
18 this group of men doesn't have that due to smoking,
19 and that if they do have those diseases it's for some
20 other cause. So they're not in there for
21 smoking-related diseases.

22 Almost half of the damages they seek in this
23 case that is not related to nursing homes, over 700
24 million dollars that they want from my client and
25 these clients is based on 19- to 34-year-old men.

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1 Now how can that be in this sophisticated
2 statistical model? It's the same problem with the
3 94-year-old women. If you're working from a national
4 sample and you don't go behind the data and look at
5 it and you project it, this is the kind of result you
6 get.

7 We looked. We looked at what the data was
8 behind the national study. We looked and found out
9 that there were 26 young men in the hospital having
10 been paid by public aid, 26 young men. That's what
11 resulted in the projection. And why were those 26
12 young men in the hospital? For just about what you'd
13 expect them to be: broken bones, paralysis,
14 epilepsy, amputation, wounds, fractures, back
15 problems. But for every one of these people that was
16 in there who was a smoker, their statistical
17 projection attributed that to smoking. Indeed,

18 there's one man in here who with no doubt we'd like
19 to meet, he was a kidney donor who donated a kidney,
20 and because he was a smoker, 91 percent of his
21 hospital expense got attributed to smoking according
22 to plaintiffs' sophisticated model. 19- to
23 34-year-old men, over 700 million dollars is what
24 they're asking for.

25 We looked at plaintiffs' models in different
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1 ways. We ran different calculations and showed how,
2 instead of asking the question smoking, if you asked
3 the question on some of the other factors they
4 had -- and they only looked at a very few factors,
5 they didn't look at personal history, they didn't
6 look at personal medical history, they didn't look at
7 diet or exercise or any of the things -- that if you
8 look at some of these other factors, you can end up
9 attributing -- using plaintiffs' own methodology --
10 you can end up under their methodology and things not
11 related to smoking proving that they spent 170
12 percent more than they spent.

13 Last point I want to make just quickly on this,
14 because it's a point our experts will make to you
15 clearly as well, is the point of statistical
16 significance. They worked off the survey and they
17 projected it, and it's like any survey. You know,
18 when you hear about elections, you always here
19 Candidate Smith the polls say is going to get 52
20 percent of the vote, then they always say something
21 else, plus or minus three percent, plus or minus four
22 percent. I'm sure you're all familiar with that.
23 That's a concept of statistical significance that
24 statisticians apply to say we have confidence based
25 on statistical science that the real answer is within

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1 the plus or minus three and four percent range. Our
2 witnesses will explain this to you in detail.

3 For now all I want to tell you is when you apply
4 those basic statistical tests to their model, the
5 plus or minus isn't three or four percent. On the
6 entirety of their damage claim, the 1.7 billion they
7 seek, the plus or minus is 111 percent. Zero is
8 within that range.

9 On their nursing home, no surprise given the
10 type of analysis we've seen, nursing home, their plus
11 and minus is 344 percent. A number, the state's
12 damages apart from nursing home, plus or minus 160
13 percent.

14 This is why -- and I'll wrap up now -- this is
15 why I said this was unreliable. This is why I said
16 it was untrustworthy. This is why I said the
17 evidence will show you that an economics professor
18 from the U of M will take that stand and say if a
19 student gave him this work, he'd flunk. This is why,
20 I'm sure, we heard nothing about these calculations
21 from Mr. Ciresi, and this is why it's important
22 throughout the course of this to listen to all of the

23 evidence.

24 I want to really thank you for your courtesy and
25 attention. Thank you very much.

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1 Thank you, Your Honor.

2 MR. STRICKER: Good afternoon, ladies and
3 gentlemen. My name is Jim Stricker and I'm here on
4 behalf of Liggett Group.

5 When you heard Mr. Webber state that he was the
6 last of the major tobacco companies, you thought
7 you'd heard it from all of them, but unfortunately
8 Liggett is not one of the major tobacco companies.
9 Liggett is the smallest of the tobacco companies.
10 Mr. Ciresi referred to our market share of being a
11 little under three percent. Unfortunately for
12 Liggett, it's actually under two percent and
13 dropping. You heard one of the brands referred to
14 previously of Chesterfield. That is currently a
15 brand that Liggett sells, but one of its smallest
16 brands. It's other brands are Eve, Lark, L&M.

17 Excuse me, I'm sorry.

18 (Mr. Stricker puts on microphone.)

19 MR. STRICKER: I'm sorry. In addition to
20 the brands that it sells, Liggett also engages in
21 private label brands. That means that when certain
22 companies, such as grocery store chain, want to sell
23 its own brand of cigarettes, they'll contract with
24 Liggett and Liggett will manufacture the cigarettes
25 for them, and then the other company would sell them.

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1 But if you add up all the private brands and
2 Liggett's own brands, again, less than two percent of
3 the market.

4 You've heard Liggett referred to a few times in
5 this case in the openings of both plaintiff and
6 defendant. I believe it will become clear through
7 the evidence in this case that Liggett is very
8 different. The first and most important point, which
9 I believe was raised by Mr. Bleakley at the beginning
10 of the defendants' opening statement, is Liggett has
11 resolved its claims with the state of Minnesota. The
12 state of Minnesota and Liggett have settled. You
13 will not be asked to render any decision on the state
14 of Minnesota's claims. That is finished. The only
15 reason Liggett is still here today is we've been
16 unable to resolve our claims brought by Blue Cross
17 and Blue Shield. Those claims relate to an antitrust
18 claim, conspiracy with the other defendants, and
19 improper sales practices.

20 We believe that the evidence will show that
21 Liggett, as the smallest cigarette manufacturer -- I
22 keep saying less than two percent -- did not and
23 could not engage in any monopolistic actions, any
24 anti-competitive actions for the antitrust claims.
25 We believe that the evidence will show not only

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1 didn't Liggett ever conspire with the other
2 defendants, but as I will go into detail, Liggett has
3 taken different positions from the other defendants
4 from the beginning of time and is a very different
5 company. And most importantly you'll find that
6 Liggett, the evidence will show that Liggett has not
7 engaged in any improper sales practices.

8 Now while Liggett is very different in both the
9 legal claims and the facts, to speed things along, as
10 you've heard -- and I know you may find it hard to
11 believe that we are trying to speed things along
12 here -- the court has instructed that only one of the
13 defense counsel will be questioning the witnesses.
14 That's to speed things up. Thus, you will not very
15 often be hearing from Liggett's lawyers. In fact
16 today my speaking with you, when the chairman of
17 Liggett, Mr. Bennett LeBow will be called as a
18 witness, and I believe Mr. Bleakley referred to him
19 earlier, and during the closing, other than those
20 three times, it is unlikely you will hear much from
21 Liggett.

22 You also unlikely will hear much about Liggett
23 during this trial, but when you do hear about
24 Liggett, it will be that Liggett is different.

25 Now I'm going to start with why Liggett is

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1 different where the plaintiffs started, in 1950. I'm
2 not going to go back to Christopher Columbus. Mr.
3 Ciresi referred to the meeting of the heads of the
4 tobacco companies at the Plaza Hotel in New York in
5 1953 to plan strategy. The evidence will show
6 Liggett wasn't there. The CEO of Liggett was not
7 involved in this meeting at the Plaza Hotel in 1953.

8 You've also seen the Frank Statement that was
9 published in these newspapers throughout the country.
10 Both plaintiffs and defendants have discussed that.
11 Plaintiffs referred to five of the six companies,
12 cigarette manufacturers, were part of the creation
13 and strategy behind the Frank Statement, and you can
14 guess who that sixth was who was not on the Frank
15 Statement. That's all at the bottom there. Liggett
16 had no involvement whatsoever with the Frank
17 Statement.

18 You've also heard about The Tobacco Institute.
19 Liggett was not involved in the creation, formation,
20 or any strategy behind The Tobacco Institute.

21 You've also heard about the Tobacco Industry
22 Research Council -- Committee, I'm sorry, the TIRC,
23 later the CTR. Again, Liggett was not part of the
24 creation, formation, or any strategy behind that
25 company.

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1 Now you will hear evidence that over time in the
2 last 40 plus years, Liggett did provide some funding
3 for certain research that the CTR performed, and that

4 during certain years Liggett was a member of The
5 Tobacco Institute. But Liggett was not involved at
6 the beginning and Liggett is currently the only
7 cigarette manufacturer in this country who is not a
8 member of CTR, it is not a member of The Tobacco
9 Institute. As I said, Liggett is different.
10 You also heard plaintiffs refer to a gentlemen's
11 agreement the companies would not engage in any
12 biological research. Well, the evidence will show
13 that Liggett couldn't have been part of any such
14 agreement because Liggett did engage in such
15 research. In fact, one of the documents that
16 plaintiff presented in their opening statement was a
17 1964 memorandum from B.A.T after its review or visit
18 to the United States and Canada. I believe
19 defendants also presented that. That memo indicated
20 that none of the tobacco companies were doing
21 biological research except Liggett. Except Liggett.
22 Those research -- the tests and the research that was
23 being referred to there related to the Wynder
24 experiments which you've been hearing much about both
25 from the plaintiffs and the defendants. Again,

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1 Liggett was not part of any gentlemen's agreement.
2 You've also heard a lot about nicotine. In fact
3 I believe Mr. Ciresi indicated that in the
4 plaintiffs' view nicotine is the most important issue
5 in this case. The evidence will show that Liggett
6 never altered any nicotine level in any cigarette
7 sold by Liggett to try to hook, addict anyone.
8 Liggett never added any nicotine to any cigarette.
9 As defendants have shown, the nicotine levels in
10 cigarette smoke has decreased over the last 40 plus
11 years. Now plaintiffs have indicated that there were
12 changes to pH, ammoniation of tobacco, and you've
13 heard a lot about that. Plaintiffs believe that's a
14 negative. The defendants have indicated what they're
15 going to show, that it's not a negative. Regardless
16 of what that shows and what you determine based upon
17 the evidence that shows, as plaintiffs pointed out,
18 Liggett is the only cigarette company that doesn't
19 ammoniate cigarettes. Liggett is different.

20 The marketing and particularly marketing to
21 youth will also be a major issue in this case.
22 Liggett does not market to youth. In fact, Liggett
23 does no advertising now, not a single billboard, not
24 a single magazine ad, no advertising whatsoever.
25 Liggett does not have any brands that are youth

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1 brands, anything that is popular with the youth.
2 None. In fact, the average age of a smoker of
3 Liggett cigarettes is over 50 years old. Not 15, 50.
4 Liggett does not market to youth.

5 Most importantly, and this will come out mostly
6 through Mr. LeBow who will testify here, Liggett is
7 trying to do the right thing as a responsible
8 company. There have been claims for many years that

9 the tobacco industry has inappropriately denied
10 health effects of smoking. Liggett is the only
11 cigarette company who acknowledges and admits that
12 smoking causes disease. You've heard a lot of
13 discussion in the last two days no other tobacco
14 company agrees with that statement. Liggett is
15 different.

16 There have been claims the tobacco industry has
17 inappropriately denied that cigarette smoking is
18 addictive. Liggett has acknowledged that cigarette
19 smoking is addictive. In fact, on every pack of
20 cigarettes that Liggett sells there's a warning,
21 "Smoking is addictive." Liggett is the only
22 manufacturer of cigarettes in this country who puts
23 that on its packages. Liggett doesn't do that just
24 in the United States, part of the litigious nature of
25 this society; we've decided to do that throughout the

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1 world wherever it is not in violation of the law of
2 another country. But "Smoking is addictive" is on
3 every pack of Liggett cigarettes. Liggett is
4 different.

5 You've also heard claims that the tobacco
6 industry has inappropriately hidden or refused to
7 disclose their ingredient list. You may hear someone
8 come up and say if you know what's in a box of
9 cereal, the ingredients, why can't you know what's in
10 a cigarette? Liggett has agreed, not as part of any
11 deal, settlement whatsoever, Liggett has agreed on
12 every carton of cigarette it sells the ingredients
13 will be on the carton. If you want to know what's in
14 Liggett cigarettes, it's on the carton. Liggett is
15 the only tobacco company who has agreed to do that.
16 Liggett is different.

17 There have also been claims that the tobacco
18 industry's inappropriately hidden documents, refused
19 to disclose them maybe, or used attorney-client
20 privileged documents. Liggett agreed to disclose all
21 its documents, much as required by the laws in
22 connection with litigation -- that's no major deal,
23 that's part of the process here that you've heard
24 about -- but more importantly, Liggett has agreed to
25 wave its attorney-client privilege. You may have

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1 heard about that privilege in a variety of contexts.
2 Generally when lawyers and clients discuss issues,
3 that can be protected from disclosures. Liggett
4 agreed, said if you want to see our documents, we're
5 an open book. To the extent we can show you our
6 documents, whether they're protected or not
7 protected, it doesn't matter to Liggett, come see our
8 documents. Liggett is the only company that's done
9 that and Liggett is different.

10 So what is Liggett doing here? Plaintiffs
11 stated this case is not about the sale of a legal
12 product, cigarettes. We all agree that that is not
13 the issue here, that no one should be held liable

14 because they sold cigarettes. That is not an
15 independent basis to hold people liable. They are a
16 legal product in this state. As I said, we're
17 brought in on antitrust claims, whether we have
18 monopolized, controlled the market for cigarettes. I
19 believe the evidence will show -- two percent of the
20 market, you don't control the cigarette
21 market -- that we haven't talked about or that we
22 haven't engaged in any anti-competitive conduct.

23 The evidence -- also the other claims are a
24 conspiracy issue, whether Liggett conspired with the
25 other defendants. I think this will become very

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1 clear throughout this trial, and I hope -- I've
2 explained that Liggett is different. Liggett has
3 taken different positions from the '50s to 1998.
4 Liggett did not -- has not conspired and is not
5 conspiring with anyone.

6 But most importantly, the question whether
7 Liggett has engaged in any improper sales activities,
8 I believe the evidence will show that Liggett has
9 acted appropriately and is selling cigarettes, a
10 legal product in this state, and should not be held
11 liable for hundreds of millions of dollars that are
12 being sought by the insurance company, Blue Cross and
13 Blue Shield.

14 Thank you for your time. It has been a two-day
15 process. You probably will not hear from us again,
16 as I said, until Mr. LeBow testifies. I request that
17 you please listen to the evidence as it deals with
18 Liggett, and when you hear "industry" or "defendants"
19 or "the companies," please try to differentiate what
20 is being offered as evidence against Liggett. I
21 believe that when the evidence comes out, you'll find
22 that Liggett has not done anything inappropriate.

23 Thank you very much.

24 THE COURT: All right, ladies and
25 gentlemen, we will recess at this time and reconvene

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1 tomorrow morning at 9:30. We will recess tomorrow at
2 11:45 and reconvene at 2:00 o'clock. On Thursday we
3 will reconvene at 10:30 rather than 9:30. Just so
4 that you have an idea what the schedule is.

5 At this time, court will adjourn.

6 THE CLERK: Court stands in recess.

7 (Court recesses.)

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